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No. 96-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the differential treatment of incarcerated men and women is exempt from review under the Constitution's equal protection guarantee and statutes prohibiting discrimination on the basis of sex because women prisoners are alleged to share certain "special characteristics," are incarcerated in separate facilities, and make up a smaller percentage of the prison population than do men?

PARTIES TO THE PROCEEDING

The petitioners in this case are the class of women prisoners incarcerated in prisons operated by the District of Columbia. Petitioners were plaintiffs in the district court and appellees in the Court of Appeals.

The class was certified by the district court on December 1, 1993. The class is defined as all women prisoners who were incarcerated in the District of Columbia correctional system as of October 1, 1993, and all women prisoners who would thereafter be incarcerated in the D.C. correctional system. Class members were represented by thirteen "Jane Doe" plaintiffs in the district court, of whom two are now deceased, nine have been released, and two remain incarcerated.

Defendants in the district court were the District of Columbia, the District of Columbia Department of Corrections (DCDC), the District of Columbia General Hospital Commission, and the following District officials, who were sued in their official capacities: Sharon Pratt Kelly, as Mayor; Walter B. Ridley, as Director of DCDC; William M. Plaut, as Associate Director for Institutions, DCDC; Gwen H. Washington, as Associate Director for Programs, DCDC, and Acting Administrator of the Correctional Treatment Facility; John S. Henderson, as Administrator of the Central Detention Facility; Douglas Stempson, as Administrator of the Minimum Security Annex; William Hall, M.D., as Assistant Director for Health Services of DCDC; and Eliza Taylor, M.D., as Chief Medical Officer, Correctional Treatment Facility.

All parties below are parties to this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES
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No. 96 -

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the women prisoners of the District of Columbia, hereby petition this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 910. Appendix (App.) at 1a. The opinions and orders

of the U.S. District Court for the District of Columbia are reported at 877 F. Supp. 634 (App. 75a) and 899 F. Supp. 659 (App. 200a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1996. App. 1a. A petition for rehearing was denied on November 14, 1996. App. 240a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, incorporated in the Fifth Amendment's Due Process Clause and thus applicable to the District of Columbia, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, sec. 1.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides in relevant part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance . . . .

STATEMENT OF THE CASE

A. Introduction and Summary.

This case involves a claim by the women prisoners of the District of Columbia that they are provided inferior and unequal prison programming based on their sex, in violation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and the equal protection component of the Fifth Amendment's Due Process Clause.

The district court found that the District of Columbia Department of Corrections (DCDC) provides women prisoners markedly inferior programming in the areas of education, vocational training, work opportunities, recreation, and religion as compared to men of similar custody level and sentence structure. App. 166a-171a. It held that these inequities were in contravention of Title IX and the constitutional equal protection guarantee. App. 166a-171a, 211a-220a.

Applying a novel "threshold" step to equal protection and Title IX analysis, the Court of Appeals reversed. App. 29a. It concluded that incarcerated women and men were not similarly situated because women prisoners had certain "special characteristics," were incarcerated in separate facilities, and made up a smaller percentage of the prison population than do men. App. 30a. Accordingly, the court refused to apply any level of scrutiny under the Constitution or Title IX to review the sex-based classification that assigns male inmates to facilities with superior, quality programming, and assigns female inmates to facilities with inferior or non-existent programming.

B. Factual Background.

1. The District of Columbia lacks a correctional facility designated for women prisoners. Prior to 1992, the District paid to have most D.C. women prisoners incarcerated by the Federal Bureau of Prisons. In 1992, however, the District decided as a money-saving measure to house its women prisoners within its own local prisons—"without having planned, developed and implemented either programs or resources" for this population. App. 99a, 117a.

District officials decided to house minimum-custody women serving sentences of less than two years at an "Annex" to the men's Minimum Security Facility (Minimum) in Lorton, Virginia. Minimum-custody men serving similar sentences are housed at Minimum's main campus. App. 118a, 162a.

District officials chose to house medium-custody women serving longer sentences of two years to life at the Correctional Treatment Facility (CTF) in the District of Columbia. Medium-custody men serving similar sentences are housed at the Central, Medium, or Occoquan facilities at the Lorton Reservation in Virginia. App. 124a, 162a-163a.

CTF is a new facility designed and built as a diagnostic and treatment center for 800 special population inmates requiring intensive treatment for mental health or substance abuse problems. App. 98a. In early 1992, only months before CTF opened, District officials changed the "mental health" program to a "program for female offenders," even though the facility was not designed for long-term general incarceration. App. 98a-100a. Other than medium-custody women, the inmates at CTF are "special population" men who are there temporarily for diagnostic processing or who

participate in a volunteer twelve-month substance-abuse rehabilitation program.

There are no maximum custody women in the D.C. system.

2. The DCDC provides the inmates in its custody with a range of rehabilitative programs including basic academics, college degree classes, vocational training, apprenticeships, prison industries, work training, work details, recreation, and religion. Male prisoners are provided with more varied, more valuable, and better-equipped programming in almost all of these areas than are women serving similar sentences with similar security status. App. 116a-131a, 166a-171a.

By way of example:

Education. Medium-custody men have access to full-time B.S., B.A., and A.A. college degree programs in several subject areas. App. 125a.[1] Medium-custody women do not. *Id.*

Vocational Training. Medium-custody men have access to vocational training in fifteen different skilled areas including auto mechanics, carpentry, and plumbing, and can participate in six different apprenticeship programs. App. 126a. Medium-custody women have no apprenticeship programs open to them and their vocational training is limited to stereotypically female programs such as sewing, typing, word processing, and duplicating. *Id.*

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[1] Because medium-custody men can transfer among facilities according to their needs, they generally have access to all of the programs offered at the three medium-custody male facilities. App. 163a-164a.

Prison Industries. Medium-custody men can learn a skill and earn up to $300 a month in several industries such as garment shop, metal shop, print shop, upholstery, accounting, furniture repair, and Metro shop. App. 120a, 129a. Medium-custody women have no opportunity to work in an industry.

Work Details. Both minimum- and medium-custody male inmates are assigned to a variety of work details including: carpentry, plumbing, electrical, mechanics, dairy, painting, welding, barbering, landscaping, bricklaying, and building maintenance. App. 120a, 128a-129a. Women prisoners are not permitted to work on these trade details and instead are relegated to the stereotypically female jobs such as clerical, culinary, and housekeeping positions. App. 119a-120a, 128a.

Recreation. Male inmates of all custody levels can participate in varied and substantial recreation programs that women cannot join. App. 123a, 130a-131a. Because CTF is a controlled movement facility, the limited recreation available to medium-custody women is more like that provided to inmates in punitive segregation than that available to the general population inmates at the men's medium-security facilities. App. 130a-131a.

3. The lack of comparable programs has significant effects on the sentences served by women prisoners and the likelihood of recidivism upon release. Women are not able to earn the good time credits for participating in academic and vocational programs that men are able to accrue. App. 117a, 166a. Women are also unable to satisfy certain program requirements for parole. In addition, the increased work opportunities for men enables them to earn and save substantially more money while incarcerated. App. 117a. Women who are not able to support themselves or their children upon release are more likely to return to prison than

those who have obtained an education or learned a marketable skill. *Id.*

C. Proceedings Below.

1. On October 1, 1993, petitioners filed suit in U.S. District Court, alleging that the District of Columbia had violated Title IX and the equal protection component of the Fifth Amendment's Due Process guarantee by creating and maintaining substantial inequities in the programming offered to women prisoners as compared to men of similar custody level and sentence structure.[2]

On December 13, 1994, after a three-week trial, the district court issued an opinion in which it held that the DCDC's failure to offer women prisoners programs and opportunities comparable to those provided to male prisoners violated Title IX. App. 156a-171a.[3] In reaching that conclusion, the court compared prisoners "who are similarly situated by virtue of their similar custody levels, sentence structures and purposes of incarceration." App. 162a. The court found that women prisoners at the Annex were similarly situated to the male prisoners at Minimum, and that women

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[2] In a portion of the case not relevant to this petition, the class also alleged that the conditions of confinement of women prisoners violated the Eighth Amendment prohibition against cruel and unusual punishment and District of Columbia laws regarding the safekeeping of prisoners.

[3] On the other aspects of petitioners' complaint, the court also held that the women were subjected to a level of sexual misconduct and sexual harassment that violated the Eighth Amendment; that the women were confined under unhealthy and unsafe living conditions, also in violation of the Eighth Amendment; and that the District provided grossly deficient obstetrical and gynecological care to women prisoners in violation of Section 24-442 of the D.C. Code, reserving the question whether these deficiencies also violated the Eighth Amendment.

prisoners at CTF were similarly situated to the male prisoners at Occoquan, Central and Medium. App. 162a-163a.[4]

The district court rejected the respondents' argument that a comparison between these groups of prisoners was inappropriate because women prisoners were less violent, more likely to have been victims of sexual abuse, more likely to have problems with substance abuse, and more likely to have parenting responsibilities. App. 164a-165a. The court concluded:

> A majority of the "unique characteristics" mentioned by the Defendants are also some of the burdens which historically have prevented women from achieving equality of opportunity. To use these characteristics to defeat a comparison of men and women prisoners would vitiate Title IX and also suggest that men and women could never be compared. App. 165a-166a.

Concurrent with its opinion, the court issued an order to remedy the programming disparities that it had found. App. 186a-193a. The order takes into account the smaller size of the female prisoner population and the physical limitations of the facilities in which they are incarcerated. For example, while medium-custody men have access to ten industrial programs, the order requires medium-custody women at CTF to have access to only two. App. 190a. Similarly, while medium-custody men enjoy up to fifteen hours of recreation

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[4] The district court held that a comparison between general-population CTF women and the special populations of men at CTF would be inappropriate because the men are there either for short-term diagnostic attention or a voluntary 18-month intensive substance abuse program. "In contrast, the [women prisoners] who reside at CTF do not choose to live there" and are there for longer periods of time. App. 163a.

per day, the order requires DCDC to provide medium-custody women with only one-third that amount. App. 192a.

2. Upon motion of the District to vacate or amend, the court issued a second opinion and order on August 14, 1995. Among other things, the court modified its initial opinion to find that DCDC's decision not to provide equal work and recreation programs to women prisoners as compared to men violated the equal protection guarantee of the Fifth Amendment as well as Title IX. App. 214a-216a. The court held that respondents had not shown any important governmental objective that was served by offering women prisoners less opportunity in programming:

> To justify the inequality by pointing to the "differences in the physical structures" merely begs the question. Similarly, relying on the "proportion of men and women" does not address the differences in the quality of what the women are offered. The limited resource argument does not explain the unequal distribution of the minimal resources that are available. App. 218a.

The District of Columbia appealed. It challenged the district court's order to the extent it required DCDC to provide comparable programming to men and women prisoners in the areas of work, recreation, and religion.[5] It also challenged several specific provisions of the court's order that did not relate to programming inequities, as well as the district court's exercise of pendent jurisdiction over the local-law claims.

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[5] The District did not challenge the award of relief in the area of education and vocational training. The reasoning of the D.C. Circuit with respect to work, recreation, and religious programming, however, would apply equally to education and vocational training as well, had they been part of the appeal.

3. A divided panel of the D.C. Circuit reversed and vacated the relief ordered by the district court with respect to work, recreation, and religious programming.[6]

The panel majority refused to apply any scrutiny to the differential treatment of men and women prisoners under either equal protection or Title IX because it found that incarcerated men and women were so dissimilar as to not require comparable treatment. First, it held that incarcerated women differ from general population men of similar custody level and sentence structure because women have "special characteristics," in that most are "single-parent primary caretakers," and few "were serving sentences for violent crime." App. 30a. Second, it found the comparisons drawn by the district court to be inappropriate because there are fewer women prisoners than there are men, and the women are housed at separate facilities. App. 30a-34a.[7] Having determined that incarcerated women and men are not similarly situated, the panel majority refused to apply *any* level of scrutiny to the District's inferior treatment of women prisoners.

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[6] The divided panel also reversed the district court's exercise of supplemental jurisdiction over the local-law claims. The court instructed the district court on remand to consider the remaining provisions of its orders in light of the recently-enacted Prison Litigation Reform Act (Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law. 104-134, 110 Stat. 1321, amending 18 U.S.C. § 3626). App. 45a-48a.

[7] The panel majority also criticized the district court for rejecting a comparison between general population medium-security women at CTF and CTF's special populations of men undergoing diagnostic or substance abuse treatment. App. 32a. In so doing, however, the panel overlooked the fact that, but for the women's sex, they would be housed at Central, Medium, or Occoquan. *See* App. 73a (Rogers, J., dissenting).

Judge Rogers dissented. Even if the District may properly segregate prisoners by sex, she reasoned, "it does not follow that it may segregate them by sex *into unequal facilities*." App. 60a. In her view, the majority's conclusion that the size, location and physical limitations of the women's facilities precluded comparison with men of similar custody level was "notably circular," because it permitted DCDC to "treat men and women dissimilarly and then rely on the very dissimilarity it has created to justify discrimination in the provision of benefits." App. 61a, 60a. In addition, Judge Rogers objected that the difference in population size—while relevant in determining whether men and women received "substantially equivalent" benefits—did not justify "avoid[ing] making a comparison at all." App. 62a.

Judge Rogers also faulted the majority for concluding that male and female prisoners are "categorically dissimilarly situated" without first inquiring into the purpose behind various programs. App. 68a-69a. For example, Judge Rogers agreed with the district court that minimum-custody men and women, despite the differences in their population size, are both "preparing for release into the community and therefore[] have the same need to fully prepare themselves for this stage of their lives." App. 67a.

Finally, Judge Rogers disputed the majority's assertion that application of equal protection principles to prisons would impose liability as a result of "program-by-program comparisons," and instead interpreted those principles to require only that prison officials explain the governmental purpose supporting a decision to offer non-comparable programs to men and women prisoners to ensure that such decision was not unlawfully based on sex discrimination. App. 71a.

4. Petitioners filed a petition for rehearing and suggestion for rehearing *in banc* with respect to the panel's "similarly situated" analysis. The petition was denied on November 14, 1996. Three judges dissented from the denial of the suggestion for rehearing *in banc* on the ground that the equal protection issue presented "an important question with serious implications for prisoners as well as other persons in the government's care and custody." App. 243a.

REASONS FOR GRANTING THE PETITION

Petitioners seek review of the D.C. Circuit's determination that the facially different treatment of incarcerated women and men is not subject to scrutiny under equal protection analysis and Title IX.[8] The decision of the Court of Appeals is in conflict with the decisions of other Circuits and presents an important question of federal law.

A. The Circuits Are Split As To Whether the Different Treatment of Men and Women Prisoners Is Subject to Scrutiny Under the Equal Protection Clause and Title IX.

The decision below exacerbates the split in the circuits as to whether the facially different treatment of men and women in prison is subject to review under either the equal protection

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[8] Although other aspects of the case have been remanded to the district court for consideration in light of the Prison Litigation Reform Act, *see supra* note 6, the portion for which petitioners seek review in this Court is final. The Court of Appeals reversed, vacated, and fully disposed of the portions of the district court's opinion and order relating to work, recreation and religious programming. There are no further proceedings as to these claims, which are distinct from the remainder of petitioners' case.

clause or Title IX. The D.C. Circuit has now joined the Eighth Circuit in refusing to apply any scrutiny under the equal protection clause to sex discrimination in prison programs and services, based on the court's threshold determination that male and female prisoners are not similarly situated. The D.C. Circuit has also invoked this analysis to foreclose any comparison of the programming afforded men and women prisoners under Title IX. App. 29a.

This approach is contrary to that of the majority of circuit courts, which have scrutinized the disparate treatment of men and women in prison notwithstanding differences between the male and female prison populations. These courts have refused to substitute a "similarly situated" threshold test for the substantive analysis required by Title IX and the equal protection clause.

In the decision below, the D.C. Circuit expressly follows the Eighth Circuit's ruling in *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995), which adopted a similarly situated "threshold test" that precluded equal protection scrutiny. In *Klinger*, the Eighth Circuit refused to apply heightened scrutiny to Nebraska's treatment of women prisoners on the grounds that the women, who were incarcerated in the state's only women's prison, failed to demonstrate that they were similarly situated to male inmates in one of the state's four men's prisons. The court noted that the men's prison selected for comparison was much larger, housed inmates with longer average sentences, and had a higher security classification than the women's prison. *But see id.* at 735-36 (McMillian, J., dissenting) (asserting that the disparities in programming were based on sex, not custody level or sentence length). In addition, the court relied on the distinguishing "special characteristics" of female inmates as single parent primary

caretakers, sexual and physical abuse victims, and non-violent offenders.

As a result, the Eighth Circuit, like the D.C. Circuit here, found that equal protection did not require that the programs provided to women in prison be comparable to those provided to men. *Klinger*, 31 F.3d at 733; *see also Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995) (rejecting equal protection challenge to disparities in prison programming because women and men prisoners are not similarly situated with respect to population size, security level, type of crime, sentence length and "special characteristics"), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S. Ct. 98 (1996). The *Klinger* ruling was subsequently extended to Title IX as well. *See Klinger v. Nebraska Dep't of Correctional Servs.*, 887 F. Supp. 1281, 1282 n.1 (D. Neb. 1995) (finding the Eighth Circuit's holding equally applicable to Title IX claims, while expressing "respectful[ ] disagree[ment]" with that holding).

The Eighth Circuit has since expanded *Klinger* to foreclose a system-wide comparison of the prison industries available to men and women, relying in part on the D.C. Circuit decision below. *Keevan v. Smith*, 100 F.3d 644, 648-49 (8th Cir. 1996). In *Keevan*, the court rejected an equal protection challenge to the disparate opportunities available to men and women throughout the state's prison system on the grounds that male and female prisoners are not similarly situated due to average differences in population size, sentence length and security level. *See id.* at 652 (Heaney, J., dissenting) (suggesting that, "despite our admonition to the contrary," *Klinger* "'stand[s] for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis'") (citation omitted).

Thus, in the D.C. and Eighth Circuits, the differential treatment of male and female prisoners—however unequal it

may be—is not subject to review under the equal protection clause or Title IX because these courts have held that certain group-based differences (including parental responsibilities, propensity to violence, and population size) preclude comparison of the two populations. Under this "threshold" approach, the government is under no obligation to establish any relationship between the asserted "special characteristic" and the differential treatment.[9]

In contrast, the majority of circuit courts confronted with a challenge to the disparate treatment of men and women in prison have undertaken the analysis required by Title IX and equal protection despite certain group-based differences between the sexes. Under this approach, the differences between the male and female prison population are taken into account, if at all, only in the context of scrutinizing the government's justification for treating the sexes differently. Thus, group-based differences are used not to avoid comparison completely but rather to determine whether the government has a compelling reason for engaging in disparate treatment on the basis of sex.

In a decision directly contrary to that below, the Ninth Circuit has held that Title IX requires prison education programs to be equally available to male and female prisoners. In *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994), the court applied Title IX to sex-based disparities in prison programming despite differences in the location and population size of the men's and women's prisons. While recognizing that the district court on remand would have to take these

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[9] The D.C. Circuit, for example, did not require DCDC to explain why the fact that women prisoners in general have parenting responsibilities and are convicted for non-violent crimes supports the decision to offer them inferior programming as compared to men.

differences into account, the Ninth Circuit held that women prisoners still must have "equal opportunity to participate in programs of comparable quality" to those offered to men. *Id.* at 1229. In addition, the court held that the prison's policy of paying merit pay for vocational work to men but not women prisoners constituted disparate treatment in violation of Title IX. *Id.* at 1231.

Similarly, in *Canterino v. Wilson*, 875 F.2d 862, 1989 U.S. App. LEXIS 4789 (6th Cir.) (unpublished opinion),[10] *cert. denied*, 493 U.S. 991 (1989), the Sixth Circuit held that the equal protection clause requires parity in male and female inmates' access to legal facilities. Applying heightened scrutiny, the court stated:

> [t]he fourteenth amendment "requires, even in the context of prison conditions, that any such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must be 'substantially related to achievement of those objectives.'" App. 251a (alteration in the original) (citations omitted).

Like the Sixth and Ninth Circuits, the Seventh Circuit has also applied heightened scrutiny to the different treatment of male and female prisoners, without first engaging in a threshold inquiry as to whether there are differences between the two groups. In *Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), *cert. denied*, 464 U.S. 996 (1983), the court reviewed a prison policy permitting female and male guards to frisk male prisoners, but only female guards to frisk female prisoners. Although the court upheld the policy as substantially related to the important interest in promoting women's employment opportunities, it distinguished the policy

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[10] Reprinted in the Appendix at 244a.

at issue from the provision of unequal educational, recreational and vocational programs, recognizing that, "[c]learly, male and female inmates must receive substantially equal facilities and conditions while in prison." *Id.* at 962 (citations omitted); *see also Betts v. McCaughtry*, 827 F. Supp. 1400 (W.D. Wis. 1993) (applying heightened scrutiny to male prisoners' equal protection challenge with respect to differential grooming privileges), *aff'd*, 19 F.3d 21 (7th Cir. 1994).

In addition, the Fifth Circuit, while reserving the question of whether a lower level of equal protection scrutiny may be appropriate in the prison context,[11] applied heightened scrutiny to a policy prohibiting male inmates from enrolling in classes at a women's prison, and did not undertake any threshold inquiry as to differences between male and female prison populations. *Smith v. Bingham*, 914 F.2d 740 (5th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991). The Fifth Circuit recognized that the challenged policy "facially classifies on the basis of gender," *id.* at 741, and therefore was subject to

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[11] The majority of courts that have addressed this question have determined that this Court's ruling in *Turner v. Safley*, 482 U.S. 78 (1987)—which held that prison regulations that impinge on an inmate's personal rights need only survive a rational basis test—does not apply to claims of gender discrimination brought under the equal protection clause. *See Pitts v. Thornburgh*, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); *Pargo v. Elliot*, 49 F.3d 1355, 1357 (8th Cir. 1995); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 523-24 n.2 (D. Nev. 1991). *But see Klinger*, 31 F.3d at 732.

This question is not presented in this case, as the D.C. Circuit did not rely on *Turner* to foreclose heightened scrutiny, and did not overrule its decision in *Pitts*, which determined that *Turner* did not apply to equal protection claims. *See* App. 34a (citing *Turner* only for the general proposition that federal courts must give deference to prison administrators).

equal protection scrutiny, but found the policy substantially related to the important state interest in maintaining prison security. *Id.* at 742-43.

Consistent with the Fifth, Sixth, Seventh and Ninth Circuits, numerous district courts have interpreted the constitutional equal protection guarantee to require scrutiny of sex-based disparities in the treatment of male and female inmates, despite differences between male and female prisoners as a group. *See, e.g., West v. Virginia Dep't of Corrections*, 847 F. Supp. 402, 407-408 (W.D. Va. 1994); *Casey v. Lewis*, 834 F. Supp. 1477, 1550-51 (D. Ariz. 1993); *McCoy v. Nevada Dep't of Prisons*, 776 F. Supp. 521, 523-25 (D. Nev. 1991); *McMurray v. Phelps*, 533 F. Supp. 742, 767-68 (W.D. La. 1982), *overruled in part on other grounds by Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981); *Bukhari v. Hutto*, 487 F. Supp. 1162, 1171-72 (E.D. Va. 1980); *Batton v. North Carolina*, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980); *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979); *Mitchell v. Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976).

The dissension between these courts and the D.C. and Eighth Circuits demonstrates the need for this Court's guidance regarding the proper application of equal protection and Title IX principles in this context.

B. This Case Raises Important Issues of Federal Law Concerning Whether a Government May Rely on Group-Based Differences Between Men and Women to Avoid Any Scrutiny of Sex-Based Discrimination.

1. The D.C. Circuit Ruling Sets a Harmful Precedent Inconsistent With Decisions By this Court.

The decision below marks a significant departure from two decades of this Court's equal protection jurisprudence requiring governments to demonstrate "an exceedingly persuasive justification" for the facially different treatment of men and women. *See United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (*VMI*); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). If allowed to stand, it would insulate from scrutiny a government's unequal treatment of men and women whenever the government articulates group-based differences between the men and women compared, regardless of the tenuousness of the connection between these differences and the reasons for the unequal treatment.

In particular, the panel decision defies and distorts this Court's recent ruling in *VMI*. The panel's reliance on differences between the male and female prison populations as an excuse for not applying any level of scrutiny to the unequal prison programs and services provided to men and women contravenes this Court's admonition that "'all gender-based classifications today' warrant 'heightened scrutiny.'" *VMI*, 116 S. Ct. at 2286 (quoting *J.E.B.*, 511 U.S. at 136). Unlike the D.C. Circuit, this Court in *VMI* applied "skeptical

scrutiny" to the government's different treatment of men and women despite the existence of average differences between the male and female populations compared. *See id.* at 2279 (discussing district court's "'findings' on 'gender-based developmental differences'"); *id.* at 2280 (acknowledging that the state's evidence of "average capacities or preferences of men and women" was not challenged).

In addition, the D.C. Circuit permitted generalizations about men and women as a group to justify providing women prisoners across the board with inferior programming, defying this Court's direction that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *VMI*, 116 S. Ct. at 2284 (emphasis in original).[12] The D.C. Circuit also disregarded this Court's requirement that the government bear the burden of proving an "'exceedingly persuasive'" justification for sex-based disparities, *id.* at 2275, and instead upheld the different treatment based on men and women prisoners as a group. *See* App. 59a-60a (Rogers, J., dissenting) (noting the government's failure to supply any reason supporting the sex-based disparities in prison programming).

In attempting to reconcile its ruling with *VMI*, the D.C. Circuit grossly misconstrued that decision. The panel read *VMI* to authorize a comparison of the different treatment

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[12] *See also Craig v. Boren*, 429 U.S. 190, 201 (1976) (striking down state law setting different drinking ages for men and women even though gender-based differential was "not trivial in a statistical sense"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (invalidating Social Security Act provision authorizing benefits for widows but not widowers, even though underlying generalizations were "not entirely without empirical support").

afforded men and women in single-sex institutions only where the populations compared are nearly the same size, relying on the similarity of enrollment at VMI and Mary Baldwin College. Such an interpretation does not comport with this Court's focus on the denial of equal opportunity to individual women, *VMI*, 116 S. Ct. at 2282, nor is it consistent with the *VMI* ruling itself. Although enrollment at Mary Baldwin College is roughly equivalent to that of VMI, enrollment in the Virginia Women's Institute for Leadership (VWIL)—the separate "parallel" program for women which the Court compared to VMI—is far smaller. *Compare id.* at 2270 (1300 men enrolled in VMI) *with id.* at 2272 (VWIL open to 25-30 women). Under the D.C. Circuit's reading of *VMI*, Virginia could have avoided equal protection scrutiny altogether had it located the VWIL program at a smaller college with even fewer offerings. Nothing in this Court's opinion countenances such a result.[13]

The panel's use of group-based differences to avoid altogether the application of heightened scrutiny to the different treatment of women prisoners departs not only from *VMI*, but also from the entirety of this Court's equal protection jurisprudence. On those occasions where this Court has ultimately found that men and women are not similarly

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[13] In addition, the D.C. Circuit placed undue weight on the discrepancy in financial resources allocated to VMI and VWIL in an effort to distinguish *VMI* from the present case. App. 33a-34a. In fact, although VMI had a much larger endowment than VWIL, Virginia had committed to provide equal financial support to in-state students attending both VWIL and VMI. *VMI*, 116 S. Ct. at 2273, 2285. Moreover, the disparity in financial reserves was only one of many aspects in which the Court found the two programs unequal. *Id.* at 2282-84. As the Court's emphasis on the intangible indicia of inequality between the two programs demonstrates, financial parity between VWIL and VMI would not have changed the result in the case. *Id.* at 2285-86.

situated with respect to a sex-based classification, it has done so only after requiring the state to justify the classification under heightened scrutiny. *See, e.g.*, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981) (holding gender-specific statutory rape law sufficiently related to state's important interest in preventing teenage pregnancy); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (upholding male-only draft registration as substantially related to important interest in raising and supporting armies where Congress had excluded women from combat); *see also* App. 68a (Rogers, J., dissenting) (noting that *Rostker* involved that "rare situation" where every member of the excluded class is identically situated with respect to the governmental purpose).

Contrary to the D.C. Circuit's approach, the determination of whether men and women are similarly situated has never been a "threshold" inquiry to be determined prior to and in lieu of heightened scrutiny.[14] App. 68a (Rogers, J., dissenting). Rather, once a court determines that the challenged classification is based on sex, as it was here, it must apply heightened scrutiny in order to determine whether men and women are similarly situated with respect to the government interests underlying the different treatment. Indeed, the very purpose of heightened scrutiny is to

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[14] The panel mistakenly relied on *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), to support the use of a similarly situated analysis as a threshold test that must be satisfied prior to the application of equal protection scrutiny. App. 28a. However, in *Cleburne*, this Court applied equal protection scrutiny to invalidate a zoning ordinance that imposed different housing requirements on the mentally retarded, despite its acknowledgement of differences between the mentally retarded and other persons. 473 U.S. at 448. Had this Court invoked a similarly situated threshold test like the panel below, it would have upheld the zoning ordinance without applying equal protection scrutiny based on differences in the populations compared.

determine whether men and women are similarly situated *with respect to the treatment at issue*, not whether there are any differences between men and women at all.

The panel's extension of its similarly situated analysis to Title IX claims is also inconsistent with this Court's precedent, and has unsettling ramifications for Title IX jurisprudence generally. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court recognized an implied right of action under Title IX, upholding a claim brought by an older female complainant who was excluded from a medical school because of her sex. At the same time, the Court acknowledged that the incidence of interrupted higher education was more common among older women than older men, and that women represented a far smaller percentage of medical students than men. *Id.* at 680 & n. 2. Under the D.C. Circuit's reasoning, the Title IX claim would have been dismissed based on a threshold determination that male and female medical school applicants were not similarly situated.

The importation of such a similarly situated "threshold inquiry" into Title IX is wholly unsupported by the language of the statute, and would eviscerate the statute's protection. In the context of intercollegiate athletic opportunities, for example, courts have uniformly required equal athletic opportunity under Title IX without first undertaking a determination of whether male and female athletes are similarly situated. *See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *see also* 34 C.F.R. § 106.41 (1996) (permitting sex-separate athletic teams under certain circumstances, but requiring equal athletic opportunity for both sexes). Under the D.C. Circuit's

analysis, however, a court could avoid application of Title IX in this context simply by noting the different numbers of male and female athletes, their use of different facilities, and any "special characteristics" of each group. Such a result is irreconcilable with the letter and spirit of Title IX.

2. The Ruling Below Would Permit A Government to Discriminate on the Basis of Sex Whenever It Can Articulate Group-based Differences Between the Sexes.

The similarly situated threshold test adopted by the majority below forecloses any inquiry into whether the government can demonstrate an "exceedingly persuasive justification" for the different treatment of men and women. *See Hogan*, 458 U.S. at 724 Instead, this decision permits the so-called "special characteristics" of women as a class to justify the provision of inferior educational, vocational, work and recreation opportunities, despite the absence of any logical connection between this inferior treatment and the asserted group-based differences. As noted by the judges dissenting from the denial of petitioners' suggestion for rehearing *in banc*, this ruling has "serious implications for prisoners as well as other persons in the government's care and custody," App. 243a, and would appear to apply to racially based different treatment as well. *See J.E.B.*, 511 U.S. at 128-29 (applying equal protection precedent addressing race-based peremptory strikes to peremptory strikes based on gender, and recognizing that such precedent is "premised on equal protection principles that apply equally to gender discrimination"); *cf. Harris v. Forklift Sys.*, 510 U.S. 17, 25-26 (1993) (Ginsburg, J., concurring) (relying on Title VII race discrimination precedent in Title VII sex discrimination case).

In addition to sanctioning the use of sex-based stereotypes to justify sex discrimination generally, the decision below will

have far-reaching implications for any equal protection (or statutory nondiscrimination) claim in which a disadvantaged class is not challenging its "separate" treatment, but whether that treatment is "equal." Under the rationale adopted by the D.C. Circuit, once prisoners (and presumably schoolchildren, student-athletes, patients and others) are placed in separate facilities on the basis of their sex, they can no longer claim a right to equal services or programs because they are no longer "similarly situated." Such a precedent has the potential to unravel the important legal protections that have developed under Title IX and the equal protection guarantee of the Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 12, 1997

Supreme Court, U.S.
FILED

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No. 96- OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Appellees,

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellants.

No. 95-7041, Consolidated with No. 95-7205

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

January 22, 1996, Argued
August 30, 1996, Decided

Before SILBERMAN, BUCKLEY, and ROGERS, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

Opinion filed by Circuit Judge ROGERS, concurring in part and dissenting in part.

BUCKLEY, Circuit Judge:

In this case, appellants raise a number of challenges to a district court judgment ordering them to improve conditions at various District of Columbia ("District" or "D.C.") facilities in which women are imprisoned. The district court found that the existing conditions violated the following statutory and constitutional provisions: (1) D.C. Code § 24-442, which creates a tort remedy for negligence by prison officials; (2) Title IX, Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 *et seq.*, which requires recipients of federal aid to provide men and women with equal access to educational programs and activities; (3) the equal protection guarantee of the Fourteenth Amendment of the United States Constitution, as applied to the District through the Fifth Amendment; and (4) the Constitution's Eighth Amendment guarantee against cruel and unusual punishment.

The court's order contains provisions relating to sexual harassment; obstetrical and gynecological care; academic, vocational, work, recreational, and religious programs; general living conditions; and fire safety. We hold that (1) the district court abused its discretion in exercising supplemental jurisdiction over claims arising under D.C. Code § 24-442, (2) Title IX and equal protection principles are not applicable here because the male and female prisoners whom the district court compared were not similarly situated, and (3) certain provisions of the district court's order provide broader relief than is necessary to remedy the violations of the Eighth Amendment. In addition, we remand the case to the district court to determine whether other portions of its order are inconsistent with the recently enacted Prison Litigation Reform Act.

I. BACKGROUND

A. The Facilities

Until recently, the District maintained no facility for women serving sentences of more than a year; all such offenders were sent to federal penitentiaries scattered throughout the country. The District has since assumed custody of such women, and it now houses them in three facilities: the Lorton Minimum Security Annex ("Annex"), the Correctional Treatment Facility ("CTF"), and the Central Detention Facility ("Jail"). The first of these facilities is located in Lorton, Virginia; the latter two in the District.

The Annex, which is situated on the grounds of the men's Minimum Security Facility ("Minimum"), consists largely of a few converted military barracks that serve as dormitories. The women in the Annex are escorted to Minimum at specified times to attend academic courses and use the gymnasium. As of January 1994, there were 936 men at Minimum and 167 women at the Annex. In this class action, the female inmates at the Annex raise challenges involving sexual misconduct, their general living conditions, and discrimination in access to academic, vocational, work, recreational, and religious programs on the basis of their sex. The medical care provided to female inmates at the Annex is governed by a separate consent decree.

CTF was designed as an 800-bed diagnostic and treatment center for offenders with special needs. In early 1992, however, the District converted part of CTF into a facility that, as of January 1994, housed 271 general population, medium-custody female inmates. In this class action, the female inmates at CTF present challenges involving sexual misconduct, their general living conditions, the quality of their obstetrical and gynecological care, and discrimination in

access to academic, vocational, work, and recreational programs on the basis of their sex.

The Jail is a medium to maximum security correctional facility. As of January 1994, it housed 168 female inmates who were either awaiting trial or sentencing or who were sentenced misdemeanants. In this action, the inmates at the Jail have limited their challenges to allegations of sexual misconduct. Medical care at the Jail is regulated by a separate consent order.

B. Procedural History

The complaint in this class action was filed on October 1, 1993. The class ("appellees"), which is comprised of the female inmates at the Annex, CTF, and the Jail, was certified without objection. The defendants include the District, the District of Columbia Department of Corrections ("Department" or "DCDC"), the District of Columbia General Hospital Commission, and numerous District officials, all in their official capacities (collectively, "appellants").

Following a three-week trial, the district court issued an opinion on December 13, 1994, in which it found multiple violations of federal and local law. *Women Prisoners of District of Columbia Dep't of Corrections v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994) ("*Women Prisoners I*"). On the same day, the court issued an order consisting of 138 paragraphs of instructions ("Order") that were intended to correct the violations. *Id.* at 679-90. The defendants subsequently moved the district court to amend the Order or stay its enforcement. The court denied the motion to amend in its entirety, and denied the motion to stay except as to four paragraphs of the Order.

On March 2, 1995, the District filed a motion for a stay

pending appeal to this court. We ordered that the case be held in abeyance pending additional proceedings in the district court on appellants' motion to stay. *Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, No. 95-7041 (D.C. Cir. Apr. 4, 1995).

On remand, the District filed a revised motion to stay and/or modify the judgment. After a review of the parties' briefs and oral argument, the district court temporarily stayed thirty paragraphs and ordered the parties to attempt to negotiate an agreement concerning those paragraphs. The parties eventually reached agreement as to 26 of the paragraphs and jointly moved the court to amend the Order.

On August 14, 1995, the district court issued a second opinion in which it supplemented the legal conclusions of the first opinion and denied appellants' motion for a stay of the Order. *Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995) ("*Women Prisoners II*"). The court also issued a second order that modified 23 paragraphs of the Order and vacated six others. *Id.* at 677-79.

C. The District Court's Opinions

1. *Factual findings*

(a) Sexual Harassment at the Jail, CTF, and the Annex

About a half dozen female inmates testified at trial that they had been sexually assaulted by prison guards. *See, e.g.*, testimony of Jane Doe W, Trial Transcript ("Tr.") at Volume I, page 36 ("I-36"), Jane Doe Q (Tr. at I-74), Jane Doe OOO (Tr. at I-100), Jane Doe Five (Tr. at IV-66), Jane Doe RR (Tr. at VI-124) and Jane Doe Z (Tr. at VII-64). The district court concluded from this testimony that there had been

"many incidents of sexual misconduct between prison employees and female prisoners in all three of the womens' [sic] facilities in this case." *Women Prisoners I*, 877 F. Supp. at 639. The court found that the level of misconduct ranged from inappropriate remarks to invasions of privacy to violent sexual assaults. *Id.* at 639-40.

According to the court, one of the "most disturbing" aspects of this misconduct was "the inadequacy of the Defendants' response to these attacks." *Id.* at 639. The court found that while the DCDC had adopted policies and procedures designed to address sexual misconduct, "these various policies and procedures are of little value because the [Department] addresses the problem of sexual harassment of female prisoners with no specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions." *Id.* at 640 (internal citation omitted).

(b) Obstetrical and Gynecological Care at CTF

The district court found that the District had provided inadequate women's medical care, specifically concluding that the care provided them was deficient in the following areas: gynecological examination, testing for sexually transmitted diseases, follow-up care, health education, and prenatal care and education. *Id.* at 643-48. The court was also concerned about appellants' use of physical restraints on pregnant inmates when they were transported to the hospital. *Id.* at 646-47.

(c) Physical Conditions of Confinement

The district court also found problems with the physical condition of the buildings at CTF. The court observed that the facility had originally been constructed as a treatment center for inmates with special needs. *Id.* at 648-49. Its

buildings were connected by covered walkways that created a closed-in setting designed only for controlled movement. *Id.* The court concluded that CTF had several structural flaws, including insufficient heating, a malfunctioning ventilation system, and defective toilets. *Id.* at 649-50.

The court found that the Annex inmates were housed in converted military barracks that were not initially designed for continued residency, that renovations and preventative maintenance have been either lax or non-existent, and that the dormitories were inadequately ventilated. *Id.* at 651-52. The court also found that the dormitories were overcrowded, and that this overcrowding had created a shortage of sanitary facilities, increased the risk of spreading infectious diseases, produced high noise levels, and created filthy living conditions. *Id.*

The court further found that fire hazards existed at both CTF and the Annex. The court identified the following difficulties at CTF: the sprinkler system was inadequately maintained; water leakage occurred in areas of the building where electrical equipment is exposed; and fire drills were seldom, if ever, conducted. *Id.* at 653-54. At the Annex, the court found that the level of fire safety was "grossly inadequate": its fire alarm system was "antiquated," little was done in the way of fire drills and staff training, the dormitories contained excessive quantities of combustible materials and inadequate compartmentalization to contain fire, and there were not enough exits to accommodate the number of people living at the facility. *Id.* at 654-55.

(d) Programs

The district court found that female inmates at CTF and the Annex did not have access to educational, vocational, work, recreational, and religious programs equal to those

made available by the District to similarly situated men. *Id.* at 656-62, 677-78. In reaching this conclusion, the court compared the programs offered to the women with those available to men in facilities that had "similar custody levels, sentence structures and purposes of incarceration." *Id.* at 675; *Women Prisoners II*, 899 F. Supp. at 670-71. Specifically, the court compared the programs available to women at the Annex with those available to the men at Minimum; and it compared the programs available to women at CTF with those available to inmates at three men's prisons: the Occoquan Facility ("Occoquan"), the Central Facility ("Central"), and the Medium Facility ("Medium"). *Women Prisoners I*, 877 F. Supp. at 656, 659, 675.

Because appellants agree that Title IX applies to the educational and vocational training programs offered inmates at District prisons, we will only summarize the court's findings with respect to those programs that, in their view, lie outside the scope of Title IX.

Work Details. The district court described work details as "support duties needed for the running of the jail." *Id.* at 657. At the Annex, women could participate in a variety of such details, including work as receptionists, housekeepers, and librarians. *Id.* At CTF, women could choose among thirteen work details, including clerical, housekeeping, and culinary assignments. *Id.* at 661. The court found, however, that similarly situated male inmates had access to better and more numerous programs than the "stereotypical" ones available to the women. *Id.* at 677 (men at Minimum could participate in details involving carpentry, electrical, and mechanical work); *id.* at 661, 678 (men at Central could participate in such work as bricklaying, mechanics, and welding).

Prison Industries. "A prison industry is a business run

out of a prison where goods are produced with inmate labor and then sold to government agencies." *Id.* at 657. At the Annex, women could work in a garment shop and a print shop; at Minimum, men could engage in agriculture and landscape work. *Id.* The court found that these programs were comparable and held that the women at the Annex and men at Minimum had equal access to industrial programs. *Id.* at 677. At CTF, women could participate in only one program that was "remotely" akin to a prison industry. *Id.* at 661. Because the men enjoyed access to a greater number of industries, *i.e.*, one at Occoquan, two at Medium, and ten at Central, *id.*, the court found that the women at CTF had been denied an "equivalent opportunity in the area of industries" in violation of Title IX. *Id.* at 678.

Recreation. At the Annex, women had access to "a recreation trailer which contains a pool table, a ping pong table, exercise bikes and a weight machine." *Id.* at 658. Furthermore, the women were escorted twice a week to recreation areas at Minimum, where they could play volleyball, basketball, and handball. *Id.* The court found that the men at Minimum had greater recreational opportunities: they had access to a gymnasium and a ball field for approximately six hours a day, Monday through Friday, as well as for three hours on several nights each week; they could use a weight trailer seven days a week; and they could participate in a variety of organized intramural team sports, as well as in a "Renaissance Drama Class." *Id.* at 658, 677.

At CTF, women could participate in scheduled recreation for an hour a day, five days a week, and had access to a gymnasium for two hours, three days a week; they were able to play basketball and volleyball in a small outside area; and they could take part in "low-impact aerobics" two days a week for an hour each day. *Id.* at 661-62. The district court found that the men had far greater opportunities for recreation. For

example, the men at Central could play cards or engage in sports or other outdoor activities between 7 a.m. and 10 p.m.; those at Medium could "have recreation all day long"; and at Occoquan, they had between five and seven hours of recreation per day, depending on the season. *Id.*

Religion. While women at the Annex had "Catholic and Protestant services on a weekly basis and a Bible Study Program," *id.* at 659, the court concluded that they did not have access to the same religious activities as the men at Minimum. *Id.* at 677-78 (observing that religious services at the Annex were not as frequent as those at Minimum). The court made no findings with respect to religious programs at CTF.

2. *Conclusions of Law*

In *Women Prisoners I*, the district court found the following to be violations of federal or D.C. law: (1) sexual harassment at the Annex, CTF, and the Jail (Eighth Amendment and 42 U.S.C. § 1983), *id.* at 665-67; (2) substandard medical care at CTF (D.C. Code § 24-442), *id.* at 667-68; (3) the shackling of pregnant women (Eighth Amendment and 42 U.S.C. § 1983), *id.* at 668-69; (4) "unconstitutionally intolerable risk of injury by fire" at the Annex (Eighth Amendment and 42 U.S.C. § 1983), *id.* at 669-70; (5) inadequate fire safety measures at CTF (D.C. Code § 24-442), *id.* at 671-72; (6) intolerable living conditions at the Annex and CTF (Eighth Amendment and 42 U.S.C. § 1983), *id.* at 670-71, 672; (7) discrimination in access to programs (Title IX), *id.* at 672-78.

In *Women Prisoners II*, the district court rejected appellants' argument that it should have declined to exercise supplemental jurisdiction over the claims based on D.C. Code § 24-442. 899 F. Supp. at 665-68. The court also concluded that the discrepancy in the programs available to male and

female inmates violated not only Title IX, but also equal protection principles as applied to the District through the Due Process Clause of the Fifth Amendment. *Id.* at 669-72.

D. The District Court's Order

The Order, which is reported at *Women Prisoners I*, 877 F. Supp. at 679-90, as amended by *Women Prisoners II*, 899 F. Supp. at 677-79, contains 132 paragraphs of detailed instructions and is to remain "in effect with all provisions for five years." ¶ 137. (The Order originally contained 138 paragraphs, but six were vacated in *Women Prisoners II*. 899 F. Supp. at 677.) The Order and its amendments are reprinted as Appendices A and B to this opinion.

The Order consists of six parts, of which the first five are relevant to this appeal:

I. *SEXUAL HARASSMENT*. ¶¶ 3-19. The provisions relating to sexual harassment are multi-faceted. First, they require the DCDC to adopt a regulation that prohibits sexual harassment and invasions of female inmates' privacy. ¶¶ 3-4, 7. This regulation must provide that female inmates who allege sexual misconduct may not be subject to any disciplinary action "regardless of the merits or the disposition of the underlying complaint." ¶ 7(c). Second, the Order authorizes the district court's Special Officer to investigate allegations of sexual misconduct and to participate in the establishment of penalties for prohibited conduct. ¶¶ 5, 6, 13 (in their entirety) and ¶¶ 8, 14, 15 (in part). Third, it requires the Department to comply with its own Inmate Grievance Procedure, which establishes the mechanisms by which inmates may report misconduct by prison guards. ¶ 9. In addition, the Order directs appellants to employ "trainers" to instruct inmates and jailers about the Department's policies and regulations regarding sexual harassment and to heighten their

awareness of the problem. ¶¶ 17-18, as amended.

II. *OBSTETRICAL AND GYNECOLOGICAL CARE.* ¶¶ 20-62. Among many other things, these paragraphs require appellants to hire a half-time health educator with obstetrical and gynecological training to provide clinical and health services to the CTF population, ¶ 20, as amended; modify the intake screening of inmates and make special inquiry about their use of contraceptives and history of sexually transmitted diseases, ¶ 24; adopt written "protocols" with regard to gynecological problems and the use of restraints on pregnant and postpartum women, ¶¶ 28, 35, as amended; and develop a written protocol governing prenatal care, ¶ 36. Other provisions concern such matters as the recording of pregnancy-related statistics, ¶ 23; Pap smears, ¶¶ 30, 32; medical staff coverage, ¶¶ 44-45; emergency care, ¶ 46; and the scheduling of appointments and the transportation of inmates to the hospital, ¶¶ 49-50, as amended, ¶ 51.

III. *PROGRAM EVALUATION.* ¶¶ 63-101. Part III requires appellants to improve the quality of the academic, vocational, work, recreational, and religious programs available to female inmates. Its purpose is to ensure that the women have access to the same opportunities and programs that are available to similarly situated men at other prisons.

With regard to academic programs, appellants are ordered to provide the women with greater access to adult education and college-level programs. ¶¶ 68-69, 70-71, as amended, ¶ 72. They must also make a variety of vocational, pre-vocational, and work programs available to them. ¶¶ 76-93, as amended. The Order requires appellants to provide the women at CTF with 25 hours of recreation per week, ¶ 96, as amended, and those at the Annex with access to a recreation trailer "8 hours a day, 7 days a week." ¶ 98. Appellants must also "improve the Annex grounds by adding a basketball

court, volleyball pit, and outdoor tables." ¶ 99. Finally, appellants must provide chaplaincy service to female inmates five days a week, including "evening hours during the week to accommodate those women working on details, industry, or in the community." ¶ 101.

IV. *ENVIRONMENTAL HEALTH.* ¶¶ 102-124. Appellants are required to improve environmental health at CTF and the Annex in a variety of ways. At the outset, they are ordered to limit the number of women imprisoned at the Annex to 135. ¶ 102, as amended. They are also directed to repair the Annex's dormitory roofs, ¶ 103; provide each inmate with "at least one vertical locker and one footlocker," ¶ 105; "replace all torn mattresses and pillows," ¶ 106; "use cart liners or disposable or washable laundry bags to transport laundry," ¶ 107; and provide each double-bunk with "a minimum of 20 footcandles of prisoner-controlled light." ¶ 108. With respect to CTF, appellants are required to improve its heating and ventilation, ¶¶ 116-17, and to "monitor the food temperature and delivery times of all foods, including special diet meals." ¶ 121.

V. *FIRE SAFETY.* ¶¶ 125-136. At the Annex, appellants are required to install and maintain fire alarm, fire detection, and sprinkler systems, ¶¶ 125-127; to ensure that bed linen and other dormitory materials are fire retardant, ¶ 128; and to "conduct fire drills 12 times per year, 4 times per shift, and [to] keep written documentation of all such drills." ¶ 129. At CTF, appellants must, among other things, "maintain the storage in the culinary storage room in a manner that does not prevent the sprinkler heads from functioning adequately," ¶ 134, and test the sprinkler system and fire pump and conduct fire drills on a periodic basis. ¶¶ 135, 136.

E. Appellants' Challenges

Appellants characterize the relief ordered by the district court as far broader than necessary to correct the constitutional and statutory violations that were found to exist, and they ask that we vacate specific provisions in each of the first five parts of the Order, as follows:

I. *SEXUAL HARASSMENT.* ¶¶ 3-19. Although appellants concede that they have failed to protect women from sexual abuse, they challenge the paragraphs that (1) authorize the Special Officer's staff to monitor sexual harassment complaints (¶¶ 5, 6, 13 (in their entirety) and 8, 12, 14, 15 (in part)); (2) require the DCDC to comply with its Inmate Grievance Procedure (¶ 9); and (3) prohibit appellants from taking any retaliatory action against inmates who file complaints, even if it is determined that the inmate's complaint was filed in bad faith (¶ 7(c)).

II. *OBSTETRICAL AND GYNECOLOGICAL CARE.* ¶¶ 20-62. Paragraphs 20-34 and 36-62, which require appellants to improve the quality of the obstetrical and gynecological care provided to inmates at CTF, are based on D.C. Code § 24-442. *See Women Prisoners I*, 877 F. Supp. at 667-68. Appellants argue that these provisions must be set aside because the district court abused its discretion in exercising supplemental jurisdiction over these local law claims. They do not challenge paragraph 35 governing the use of physical restraints on pregnant women, which the court found to violate the Eighth Amendment.

III. *PROGRAM EVALUATION.* ¶¶ 63-101. These paragraphs are based on alternative grounds: (1) Title IX, which requires recipients of federal aid to provide men and women with equal access to educational programs and activities, *see Women Prisoners I*, 877 F. Supp. at 676-78;

and (2) constitutional equal protection principles, which require that men and women who are similarly situated be treated alike, *see Women Prisoners II*, 899 F. Supp. at 669-72. Appellants ask that we vacate paragraphs 64-67 and 83-99 "to the extent that they affect work details, prison industries, work training, and recreation," Brief for Appellants at 37, because, they contend, these activities are unrelated to academic and vocational education. They also object, as "having nothing to do with Title IX," *id.*, provisions governing law library hours, ¶ 64; transportation of prisoners to job interviews, ¶ 93; "large group events," ¶ 97; and religious programs, ¶¶ 100-101. In addition, appellants argue that equal protection principles have no application to this case because the district court compared male and female inmates who were not similarly situated. Finally, they raise a general objection to the remedies as being far too expansive and burdensome, citing, as examples, paragraphs 71 (requiring the provision of college educations), 98 and 99 (mandating hours for the recreational trailer and the construction of basketball and volleyball facilities and picnic tables at the Annex), and 64 (requiring the coordination of the timing of activities "to maximize women prisoners' participation in as many areas as possible").

IV. *ENVIRONMENTAL HEALTH.* ¶¶ 102-124. Appellants challenge paragraph 102, as amended, which imposes a population cap at the Annex. They argue that it is not warranted and encroaches on their ability to incarcerate convicts. They also make vague challenges to the other paragraphs in this section, contending that they are overbroad and unduly intrusive.

V. *FIRE SAFETY.* ¶¶ 125-136. These paragraphs address the court's findings of violations of the Eighth Amendment at the Annex, and of D.C. Code § 24-442 at CTF. *See Women Prisoners I*, 877 F. Supp. at 669-70,

671-72. Appellants challenge those relating to CTF (¶¶ 133-136), contending that the district court abused its discretion in exercising supplemental jurisdiction over claims arising under that section.

F. The Prison Litigation Reform Act of 1995

On April 25, 1996, following oral argument in this appeal, the Prison Litigation Reform Act of 1995 ("PLRA" or "Act") became effective. The reforms were enacted as Title VIII, sections 801 and 802 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Stat. (Apr. 26, 1996). The Act amends 18 U.S.C. § 3626, which is now entitled "Appropriate remedies with respect to prison conditions." It governs all civil litigation, whether in a federal or state court, with respect to conditions in a federal, state, or local prison that are alleged to violate a federal right. 18 U.S.C. § 3626(a)(1)(A), (d), and (g)(2) and (5). It applies to pending cases such as this one. *Id.* § 3626(b)(1)(A)(iii) & (b)(2).

In supplemental briefs submitted by the parties, appellants argue that the Act has invalidated the great majority of the paragraphs in the Order. Specifically, they maintain that the PLRA (1) denies federal courts the authority to order prospective relief to correct violations of local law; (2) precludes the assigning of non-judicial functions to a court-appointed special officer; (3) prohibits the award of relief that is not "narrowly drawn"; and (4) strips federal courts of the power to impose population caps on prisons except under circumstances that are not satisfied here.

In response, appellees question appellants' construction of the PLRA and raise a number of constitutional and other challenges to the Act. They also note that they had originally

alleged that the inadequate medical care and fire safety provided the female inmates at CTF violated both D.C. Code § 24-442 and the Eighth Amendment. Therefore, if we should find that the Act divested the district court of its supplemental jurisdiction over the section 24-442 claims, they ask that we remand those issues so that the court may consider the constitutional questions previously reserved.

We will not address appellees' objections to the Act for two reasons: First, we are able to dispose of the majority of appellants' challenges on the basis of pre-PLRA law. Second, because the new statute may be dispositive of the remaining challenges and may provide the basis for new ones, we will remand the provisions we do not vacate so that the district court may review them in light of the PLRA. Appellees will be free, at that time, to bring their various challenges to the Act and to renew their Eighth Amendment claims with respect to medical care and fire safety at CTF.

II. DISCUSSION

As a preliminary matter, we think it appropriate to emphasize that federal courts must move with caution when called upon to deal with even serious violations of the law by local prison officials. As the Supreme Court observed in *Missouri v. Jenkins*, 495 U.S. 33, 51, 109 L.Ed.2d 31, 110 S. Ct. 1651 (1990), "one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions." This respect for local authorities is at its zenith in the context of prison reform litigation:

> "The problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of

> resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

Rhodes v. Chapman, 452 U.S. 337, 351 n.16, 69 L.Ed.2d 59, 101 S. Ct. 2392 (1981) (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05, 40 L.Ed.2d 224, 94 S. Ct. 1800 (1974)). *See also Bell v. Wolfish*, 441 U.S. 520, 548, 60 L.Ed.2d 447, 99 S. Ct. 1861 (1979) ("the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 36 L.Ed.2d 439, 93 S. Ct. 1827 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.").

Only weeks ago the Supreme Court reversed a district court order that had mandated detailed, system-wide changes in Arizona's prison law libraries. *Lewis v. Casey*, 135 L.Ed.2d 606, 116 S. Ct. 2174 (1996). Writing for the majority, Justice Scalia observed that, in *Preiser*, the Court had held that "considerations of comity . . . require giving the States the first opportunity to correct errors made in the internal administration of their prisons," and that the district court in Lewis had "totally failed to heed the admonition of *Preiser*." 116 S. Ct. at 2186 (internal quotation marks and citation omitted).

A. Supplemental Jurisdiction

The district court concluded that the DCDC had failed to provide adequate medical care and fire safety at CTF in

violation of D.C. law, which provides that the Department

> shall have charge of the management and regulation of [D.C. prisons], and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institutions.

D.C. Code § 24-442. Of the Order's 132 paragraphs, roughly one-third are intended to remedy violations of this section. *See Women Prisoners I*, 877 F. Supp. at 667-68; 671-72; Order at ¶¶ 20-34; 36-62; 131-32 (to the extent that they relate to CTF); 133-36. Appellants argue that the district court's exercise of jurisdiction over these D.C. Code claims violated the supplemental jurisdiction provisions of the Judicial Improvements Act of 1990, 28 U.S.C. § 1367 (1994).

When a federal court has an independent basis for exercising federal jurisdiction, it may, in certain circumstances, also exercise pendent, or supplemental, jurisdiction over related claims under state law. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 16 L.Ed.2d 218, 86 S. Ct. 1130 (1966), the Supreme Court crafted a two-part test to determine when the assertion of jurisdiction over a state law claim is appropriate. First, the district court must determine whether the state and the federal claims "derive from a common nucleus of operative fact"; if they do, the court has the power, under Article III of the Constitution, to hear the state claim. *Id.* at 725. Second, even if it concludes that it has that power, the district court must then decide whether to exercise its discretion to assert jurisdiction over the state issue. *Id.* at 726. The Supreme Court cautioned that

> pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to

> exercise jurisdiction over state claims . . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. A district court's decision to resolve state law claims is reviewed for an abuse of discretion. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1265-66 (D.C. Cir. 1995).

In 1990, Congress enacted the supplemental jurisdiction statute, which provides in relevant part:

> (a) Except as provided in subsections (b) and (c) . . ., in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution . . . .
>
> * * * * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims

over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * * * * *

(e) As used in this section, the term "State" includes the District of Columbia . . . .

28 U.S.C. § 1367. As we observed in *Diven v. Amalgamated Transit Union International and Local 689*, 309 U.S. App. D.C. 23, 38 F.3d 598, 601 (D.C. Cir. 1994), the extent to which section 1367(c) has modified the district's court's discretion to hear claims under local law is a matter of some dispute. In *Diven*, we rejected the argument that section 1367 had restricted the district court's discretion to decline to exercise supplemental jurisdiction, *see id.*; and we have since stated that section 1367(c) "essentially codifies [*Gibbs*]," *Edmondson & Gallagher*, 48 F.3d at 1266.

Here, the district court clearly had the power to consider appellees' local claims under section 24-442. Their claims under the Fifth and Eighth Amendments and Title IX were substantial enough to confer subject matter jurisdiction on the court, *see Gibbs*, 383 U.S. at 725; and the local law claims, relating to the adequacy of the medical care and fire safety at CTF, arose from a "common nucleus of operative facts" as the federal claims; namely, the District's decision to reassume custody of its female prisoners and its alleged failure to provide for their needs. The question before us, then, is whether the court abused its discretion in exercising jurisdiction over the local claims.

The supplemental jurisdiction statute provides that district

courts may decline jurisdiction over claims that "raise[ ] a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). Appellants argued below, and renew their argument on appeal, that the novelty of appellees' request for equitable relief based on section 24-442 precluded the exercise of supplemental jurisdiction. Specifically, they contend that the section merely extends the common law of torts to local prisons. *See, e.g., District of Columbia v. Mitchell*, 533 A.2d 629, 639 (D.C. 1987). *See also Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988); *Hughes v. District of Columbia*, 425 A.2d 1299, 1302 (D.C. 1981); *Gaither v. District of Columbia*, 333 A.2d 57, 60 (D.C. 1975). Appellants point out that the statute has been relied upon by inmates suing for monetary damages and that D.C. courts have applied ordinary tort principles to those cases. *See, e.g., Mitchell*, 533 A.2d at 633; *Matthews v. District of Columbia*, 387 A.2d 731, 732 (D.C. 1978). Furthermore, appellants observe that the District of Columbia Court of Appeals has relied upon cases in other jurisdictions that have held that similar laws simply permit a common law tort action for inmate claims against prison officials. *See Gaither*, 333 A.2d at 60 (citing *Justice v. Rose*, 102 Ohio App. 482, 144 N.E.2d 303, 305 (Ohio App. 1957) (Ohio statute is "simply declaratory of the common law")). Finally, appellants note that the statute has never been interpreted to allow inmates to seek injunctive relief such as that granted here.

The district court rejected appellants' arguments and concluded that the award of injunctive relief under section 24-442 did not raise a novel issue of local law. It stated that "the exercise of injunctive relief . . . is an unexceptionable feature of the common law." *Women Prisoners II*, 899 F. Supp. at 668. We respectfully disagree with the district court's analysis. While it is true, of course, that the common law recognized the propriety of injunctive relief in certain instances, it was never regarded as relief of first resort;

indeed, in tort actions, the standard formulation of the common law on this point is that equitable relief, such as an injunction, will be granted only when plaintiff's legal remedies are inadequate. *See* John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 218, at 369 (5th ed. 1941); William Q. de Funiak, *Handbook of Modern Equity* § 18, at 32 (2d ed. 1956). Furthermore, courts have long stated that a variety of factors, including the public interest, may weigh against the award of an injunction. *See Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 77 L.Ed. 1208, 53 S. Ct. 602 (1933); *Blair v. Freeman*, 125 U.S. App. D.C. 207, 370 F.2d 229, 239 (D.C. Cir. 1966).

We think it significant that we can find no case in which a D.C. court has awarded injunctive relief under section 24-442; nor are we aware of any case in which injunctive relief was sought under this section of the D.C. Code, even though the inmates of D.C. prisons are no strangers to the judicial system and have frequently sought injunctive relief in both the D.C. and federal courts. In the last major prisoners' class action to come before us involving allegations of, *inter alia*, inadequate medical care and fire safety, the claims were pled solely as Eighth Amendment violations. *See Inmates of Occoquan v. Barry*, 269 U.S. App. D.C. 210, 844 F.2d 828, 829 (D.C. Cir. 1988) ("*Occoquan*"). No one seized upon the "unexceptionable" idea of seeking alternative injunctive relief under section 24-442.

The Supreme Court has counseled that "the proper function of [a] federal court is to ascertain what the state law is, not what it ought to be," *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497, 85 L.Ed. 1477, 61 S. Ct. 1020 (1941); and we have observed that "a federal court should be reluctant to retain pendent jurisdiction over a question for which state jurisprudence gives inadequate guidance." *Financial General Bankshares, Inc. v. Metzger*, 220 U.S.

App. D.C. 219, 680 F.2d 768, 776 (D.C. Cir. 1982). Thus, while we will generally defer to a district court's decision to assert supplemental jurisdiction, that deference is not boundless. In *Metzger* and *Doe v. Board on Professional Responsibility of the District of Columbia Court of Appeals*, 230 U.S. App. D.C. 367, 717 F.2d 1424 (D.C. Cir. 1983), we held that the district court had abused its discretion in deciding pendent claims when the local law was unsettled. We noted that "'although the District Court devoted considerable time, effort and care to these questions, in a completely unsettled area of local law a federal District Court opinion is no substitute for an authoritative decision by the courts of the District of Columbia.'" *Doe*, 717 F.2d at 1428-29 (quoting *Metzger*, 680 F.2d at 778). *See also Grano v. Barry*, 236 U.S. App. D.C. 72, 733 F.2d 164, 169 (D.C. Cir. 1984) (because, among other factors, the case involved an unsettled issue of local law, "appellees' remedy, if any, lies in the courts of the District of Columbia"); *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995) (under section 1367(c), state "courts are the appropriate forum to decide [a] novel and complex issue of state law"); *Lyon v. Whisman*, 45 F.3d 758, 760 n.4 (3d Cir. 1994) (section 1367(c) "counsels against the exercise of jurisdiction when 'the claim raises a novel or complex issue of State law'").

Our dissenting colleague contends that "whatever other objections might be raised to the district court's enforcement of local law in this case, . . . it cannot be said that the court's action was novel. *See Campbell v. McGruder*, 416 F. Supp. 100, 105 (D.D.C. 1975) (for constitutional violation, imposing mandatory injunction that in part required local agencies to remedy violations of local fire, building, housing, health, and food regulations at D.C. Jail) . . ." Dissent at 5. In other words, the dissent contends that in *Campbell* the district court had awarded equitable relief to remedy a local law violation, and therefore the district court's action in this case has a

precedent. With all respect, we think this distorts the holding in *Campbell*. There, the district court found that prison conditions violated the Eighth Amendment; to remedy these constitutional violations, the district court ordered the District to comply with local law provisions. *See Campbell*, 416 F. Supp. at 105. Here, the district court suggested that the medical care at CTF might rise to the level of an Eighth Amendment violation, *see Women Prisoners II*, 899 F. Supp. at 667; nevertheless, it expressly declined to decide the issue on constitutional grounds. *See Women Prisoners I*, 877 F. Supp. at 667 n.42.

Furthermore, the dissent mischaracterizes our holding when it states that "the judges of the Superior Court of the District of Columbia would . . . be . . . surprised . . . to hear it suggested that they lacked the authority to impose appropriate injunctive relief in the face of ongoing institutional failure to meet a legal duty of care." Dissent at 5 n.5. Plainly, local courts are free to interpret section 24-442 as authorizing injunctive relief. We simply repeat our earlier point: they never have. The dissent is quite confident that the local courts would so interpret this statute; we confess to being impressed by the fact that they have never done so.

The intrusiveness of the relief sought also weighs against the exercise of pendent jurisdiction. *See* 28 U.S.C. § 1367(c)(4) (district court may decline to exercise supplemental jurisdiction when "in exceptional circumstances, there are other compelling reasons for declining jurisdiction"). The section of the Order relating to medical care at CTF is a case study in the judicial micromanagement of a local prison system. The Order requires appellants, *inter alia*, to hire a nurse midwife to provide additional services to the female inmates (¶ 20, as amended), establish a pre-natal clinic (¶ 22), maintain statistics on the number of pregnancies and "birth outcomes" (¶ 23), develop and implement detailed protocols

concerning the care for a variety of diseases (¶ 28), develop protocols providing guidelines for high-risk pregnancies involving women with histories of alcohol and drug abuse and venereal diseases (¶ 36), arrange for obstetrical examinations of pregnant women in accordance with a detailed schedule (¶ 37), implement "an obstetrical and gynecological health education program that satisfies a recognized national medical standard" (¶ 43, as amended), and ensure that female inmates are transported to the hospital, even for routine procedures, "no more than 2 hours before the scheduled time of their appointment" (¶ 50, as amended).

These may all be highly desirable measures, but the Supreme Court has repeatedly warned against such detailed marching orders. *See, e.g., Lewis*, 116 S. Ct. at 2186. In *Grano*, as in this case, the district court applied a D.C. statute in a novel way to assume control over local political processes. We dissolved the injunction, explaining:

> In general, principles of comity and the desirability of a surer-footed reading of applicable law support the determination of state claims in state court. Determination by the state court is especially important where the case involves novel and unsettled issues of state law. Here, the law in question is new, its meaning ambiguous and sharply disputed. *Moreover, the district court should not retain jurisdiction because this case directly implicates the processes by which a locality governs itself.* Appellees' remedy, if any, lies in the courts of the District of Columbia.

733 F.2d at 169 (emphasis added) (citation and internal quotation marks omitted).

By its plain terms, section 24-442 simply requires the District's jailers to exercise reasonable care in discharging

their duties. The district court and dissent would read this bland codification of tort principles to empower federal courts to usurp control over fire safety and medical care at local prisons. There can, of course, be no limiting principle here. Issues relating to security, sanitation, food preparation, ventilation, etc., will all come within the court's authority. We wonder whether the lawmakers who enacted section 24-442 intended to transfer control over the District's prisons to the courts (or, more likely, a small cadre of court-appointed special officers). If this be the import of section 24-442, let the District's courts proclaim it.

Because it is not settled that section 24-442 authorizes injunctive relief, and because federal courts are obliged to exercise restraint in the extraordinary circumstances posed by prison litigation of this nature, we hold that the district court abused its discretion in exercising jurisdiction over these local claims in violation of the supplemental jurisdiction statute and the well-established principles that it has codified. We therefore vacate ¶¶ 20-34, 36-62; 131-32 (to the extent that they relate to CTF); and 133-36.

B. The Programs

The district court found that female inmates at CTF and the Annex had not received the same access to academic, vocational, work, recreational, and religious programs that were available to similarly situated men at other prisons. In its original opinion, the court held that this violated Title IX. *Women Prisoners I*, 877 F. Supp. at 672-78. In *Women Prisoners II*, 899 F. Supp. at 669-72, the court concluded that the unequal access to programs also violated the equal protection principles of the Constitution. Part III of the Order requires appellants to improve the quantity and quality of these programs at CTF and the Annex, *see* ¶¶ 63-101; it also requires appellants to increase the women's access to a law

library (¶ 64) and "group events" (¶ 97) and to transport them to job interviews (¶ 93).

Appellants do not challenge the provisions that relate to educational (academic and vocational) programs. They ask us, however, to vacate those paragraphs of the Order (¶¶ 83-101, in their entirety, and ¶¶ 64-67, in part) that require them to upgrade the work, recreational, and religious programs available to female inmates, and that relate to law library hours, group events, and transportation to job interviews. They argue, first, that those prison activities are not "educational" and, as a consequence, are not subject to Title IX; second, they assert that the district court's equal protection analysis is fundamentally flawed because the women at the Annex and CTF are not similarly situated to the men at the other facilities. We address the latter argument first because the district court's Title IX and equal protection analyses are both predicated on its conclusion that the respective prison populations were similarly situated. *See Women Prisoners I*, 877 F. Supp. at 675-76; *Women Prisoners II*, 899 F. Supp. at 670-71.

The Fourteenth Amendment's Equal Protection Clause requires States to treat similarly situated persons alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985). The District of Columbia is subject to that requirement by virtue of the Fifth Amendment's guarantee of due process of law. *See Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L.Ed. 884, 74 S. Ct. 693 (1954); *Family Division Trial Lawyers of the Superior Court--D.C., Inc. v. Moultrie*, 233 U.S. App. D.C. 168, 725 F.2d 695, 697 n.1 (D.C. Cir. 1984). The Constitution, however, "'does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Plyler v. Doe*, 457 U.S. 202, 216, 72 L.Ed.2d 786, 102 S. Ct. 2382 (1982) (quoting *Tigner v. Texas*, 310 U.S. 141, 147,

84 L.Ed. 1124, 60 S. Ct. 879 (1940)); *accord Michael M. v. Superior Court*, 450 U.S. 464, 469, 67 L.Ed.2d 437, 101 S. Ct. 1200 (1981). Thus, the "dissimilar treatment of dissimilarly situated persons does not violate equal protection." *Klinger v. Department of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994) ("*Klinger I*"). The threshold inquiry in evaluating an equal protection claim is, therefore, "to determine whether a person is similarly situated to those persons who allegedly received favorable treatment." *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995). We believe the same principle should apply in Title IX cases. *See Klinger* v. *Nebraska Dep't of Correctional Services*, 887 F. Supp. 1281, 1286-87 (D. Neb. 1995) ("*Klinger II*").

In reviewing the district court's conclusions, we begin, as indicated above, by addressing its assumption that the prisoners at the several facilities were similarly situated "by virtue of their similar custody levels, sentence structures and purposes of incarceration." *Women Prisoners I*, 877 F. Supp. at 675. Appellants argue that these are only three of a number of factors that must be considered when determining whether two groups of inmates are sufficiently similarly situated to render meaningful a comparison of the programs available to each.

Two recent cases are instructive in this regard. In *Klinger I*, the Eighth Circuit observed that prison officials must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services. *See Turner*, 482 U.S. at 84-85. Program priorities thus differ from prison to prison, depending on innumerable variables that officials must take into account. 31 F.3d at 732. A later case, *Pargo v. Elliott*, 894 F. Supp. 1243, 1254-62 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *pet. for cert. filed* (Apr. 8, 1996) (No. 95-8906), illustrates the variables

that must be taken into consideration. In concluding that the female inmates were not similarly situated to the male inmates with whom they sought to be compared, the district court in *Pargo* placed particular stress on five factors: population size of the prison, security level, types of crimes, length of sentence, and special characteristics. 894 F. Supp. at 1259--61. *See also* testimony of Regina Gilmore, Acting Female Program Coordinator at DCDC, at Tr. IX-5-6, and of Dr. T.A. Ryan, expert witness, at Tr. XI-38-39 (programming needs of inmates are gauged by their classification, which takes the following factors into account: custody level; medical, educational, and employment histories; substance abuse information; impending factors relating to pre-release; results of psychological testing; social services reports; and security risks).

Here, the district court acknowledged that 82 percent of women incarcerated in the facilities operated by the District were single-parent primary caretakers, and that only seven percent were serving sentences for violent crimes. *Women Prisoners I*, 877 F. Supp. at 656. It failed, however, to make any findings regarding the types of crimes for which male inmates had been convicted, or other "special characteristics" of male inmates. Compare with *Pargo*, 894 F. Supp. at 1254-57 (addressing the "types of crimes" and "special characteristics" of male inmates before drawing comparison to the female inmates). Nor did it take into account the striking disparities between the sizes of the prison populations that were being compared.

The district court found that the female inmates at the Annex were similarly situated to the men at Minimum. *Women Prisoners I*, 877 F. Supp. at 656; *Women Prisoners II*, 899 F. Supp. at 670. Yet Minimum had a population of 936 prisoners in contrast to the 167 at the Annex. *Women Prisoners I*, 877 F. Supp. at 656.

It is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one. We doubt, for example, that tuition-paying parents who entrust their daughters to the all-women Smith College in Northampton, Massachusetts, would raise an eyebrow (let alone accuse the college of sex discrimination) on learning that Smith offers its 2,800 students approximately 1,000 courses while Harvard University provides its 6,600 undergraduates with three times as many.

Even if the women at the Annex had access to a third or half the number of work and religious programs as the men at Minimum, because of the six-to-one difference in their respective populations, on a per inmate basis, the women had access to two or three times the number of programs as did the men. *Cf. Jeldness v. Pearce*, 30 F.3d 1220, 1233 (9th Cir. 1994) (Kleinfeld, J., dissenting) (while female inmates have access to fewer total number of programs, "the women's prison has almost 2½ times as many [programs] per prisoner as the most generous male prison"). We do not suggest that these mechanical ratios are a test of comparability; merely that, standing alone, the difference in the number of programs provided by prisons having vastly different numbers of inmates cannot be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection. More than that is required.

As regards the women at CTF, the district court found that they were similarly situated to male inmates at the Occoquan, Central, and Medium facilities. *Women Prisoners I*, 877 F. Supp. at 659; *Women Prisoners II*, 899 F. Supp. at 671. While CTF is an 800-bed facility, and thus arguably comparable in size to Central (1,373 inmates), Medium (1,016 inmates), and Occoquan (1,767 inmates), the female inmates at CTF number only 271. The district court specifically rejected a comparison of CTF men with its women because

the "men reside at CTF for either short-term diagnostic attention or a voluntary 18-month intensive substance abuse program." *Women Prisoners I*, 877 F. Supp. at 675. We note, however, that somewhere between 35 percent and 50 percent of the women at CTF are serving sentences of less than two years, and the vast majority of the remaining women are serving sentences of between two and four years. *Id.* at 675 n.50. In other words, the women at CTF, like the men, are not being incarcerated there for an extended period of time. The district court failed to make any findings regarding the programs available to male inmates at CTF, and there is thus no evidence that they enjoy access to more fulfilling opportunities than the women. The female inmates at CTF are, therefore, foreclosed from making an equal protection challenge.

The dissent contends that our analysis errs because we have ignored "how the prisoners came to be segregated," with women typically assigned to smaller prisons than the men. Dissent at 12. As an initial matter, we note that the segregation of inmates by sex is unquestionably constitutional. *See Pitts v. Thornburgh*, 275 U.S. App. D.C. 332, 866 F.2d 1450 (D.C. Cir. 1989). The District's decision to imprison women in smaller facilities than the typical male prison is the obvious result of an undisputed fact: there are far fewer female inmates. As of January 1994, the total number of female inmates incarcerated in all of the District's jails was 606; this is considerably less than the total population at the smallest male facility (Minimum, pop. 936) discussed in this case. It would be difficult for one facility to house all these female inmates because they range from minimum to maximum custody, from those awaiting immediate release to those serving long sentences.

Furthermore, our decision here is altogether consistent with the Supreme Court's most recent articulation of equal

protection principles in *United States v. Virginia*, 135 L.Ed.2d 735, 116 S. Ct. 2264 (1996) ("*VMI*"). In *VMI*, the Supreme Court compared the programs available at the all-female Mary Baldwin College, where the Virginia Women's Institute for Leadership ("VWIL") is located, with the programs available at the all-male Virginia Military Institute ("VMI"). The enrollment at Mary Baldwin College is 1,327 students, of whom 650 actually live on the campus, *United States v. Commonwealth of Virginia*, 852 F. Supp. 471, 500, 501 (W.D. Va. 1994); the enrollment at VMI is 1,124, *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1419 (W.D. Va. 1991). Despite their comparable sizes, the two colleges offered vastly different educational and athletic programming. The Court noted:

> Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet. VMI awards baccalaureate degrees in liberal arts, biology, chemistry, civil engineering, electrical and computer engineering, and mechanical engineering. VWIL students attend a school "that does not have a math and science focus"; they cannot take at Mary Baldwin any courses in engineering or the advanced math and physics courses VMI offers.

VMI, 116 S. Ct. at 2284 (citations omitted).

In addition, the Court noted the extreme discrepancy in the financial resources available to Mary Baldwin and VMI. *Id.* at 2285. Here, while appellees have alleged that the District provides inferior programs, they have not alleged that the District allocates fewer resources per female inmate, nor was any evidence apparently introduced at trial to that effect. Appellees' claim, therefore, would appear to be that appellants have mismanaged the resources allocated to female inmates by failing to provide them with the identical programs offered to

the men. In effect, appellees are inviting this court to find that the District's decision to provide male (but not female) inmates with access to any given program violates equal protection principles.

We decline this invitation. While certain programs (such as a work detail in auto mechanics) may be available only to male inmates, other programs (such as a life skills class) may be available only to female inmates. Under the program-by-program method of comparison embraced by the dissent, any divergence from an identity of programs gives rise to equal protection liability. Thus, if male inmates have access to a work detail that is unavailable to women, that violates equal protection. If men can spend an extra hour a day in a gymnasium, that violates equal protection. Conversely, if women had access to a parenting class unavailable to men, that violates equal protection. Such an approach completely eviscerates the deference that federal courts are obliged to give prison administrators. *See Turner*, 482 U.S. at 84-85, 89. As the Eighth Circuit has observed,

> as between any two prisons, there will always be stark differences in programming. Assuming that all prisons start with adequate yet limited funding—as we must here, because plaintiffs do not claim that [the correctional facility] is subject to discriminatory funding--officials will calibrate programming needs differently in each prison, emphasizing in one prison programs that they de-emphasize in others. Thus, female inmates always can point out ways in which male prisons are "better" than theirs, just as male inmates can point out other ways in which female prisons are "better" than theirs. *Klinger*, 31 F.3d at 732.

Finally, we note that an inmate has no constitutional right to work and educational opportunities. *Inmates of Occoquan v. Barry*, 269 U.S. App. D.C. 210, 844 F.2d 828, 836 (D.C.

Cir. 1988). While an inmate has a limited right to exercise, this right is violated only if "movement is denied and muscles allowed to atrophy, [or] the health of the individual is threatened." *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985). In and of itself, idleness does not violate the Eighth Amendment protection against cruel and unusual punishment; indeed, idleness does not even constitute "punishment." *See Rhodes*, 452 U.S. at 348. Thus, the District could, entirely consistent with the Constitution, deprive male and female inmates of virtually all of the programs they now enjoy. If federal courts could find equal protection liability whenever male and female inmates have access to different sets of programs, budget-strapped prison administrators may well respond by reducing, to a constitutional minimum, the number of programs offered to all inmates. As the *Klinger* court observed,

> prison officials would be far less willing to experiment and innovate with programs at an individual institution knowing that a federal court could impose liability on the basis of a program [by program] comparison. Indeed, inmates would suffer because officials would likely provide each institution with the bare constitutional minimum of programs and services to avoid the threat of equal protection liability.

Klinger, 31 F.3d at 733.

Given these significant differences in the situations of the women at the Annex and CTF and those of the men at the facilities with which the court compared them, and given the fact that the court's Title IX and equal protection analyses both depend on findings that they were similarly situated, we need not examine the programs themselves in order to vacate the program-related provisions that appellants have challenged. But even though we do not address the scope of Title IX in

the prison context, we admit to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned. We therefore vacate ¶¶ 83-101 in their entirety and ¶¶ 64-67 to the extent that they do not relate to educational programs.

C. Eighth Amendment

The district court concluded that the following conditions violated the Eighth Amendment guarantee against cruel and unusual punishment: (1) the pattern of sexual harassment at the Annex, CTF, and the Jail, *Women Prisoners I*, 877 F. Supp. at 664-66; (2) the use of physical restraints on women in their third trimester of pregnancy, *id.* at 668; (3) the general living conditions at both CTF and the Annex, *id.* at 670-71; 672; and (4) the inadequacy of the provisions for fire safety at the Annex, *id.* at 669-70. The Order addresses each of these perceived violations. *See* ¶¶ 3-19 (sexual harassment), ¶ 35 (physical restraints on pregnant women), ¶¶ 102-124 (general living conditions at CTF and the Annex), and ¶¶ 125-132 (fire hazards at the Annex). (The court had originally concluded that the "lack of child visitation and inadequate child placement counseling at CTF" violated the Eighth Amendment, *id.* at 669, but it later reversed itself and vacated the relevant paragraphs (39-42) of the Order, *Women Prisoners II*, 899 F. Supp. at 674-75.)

The Supreme Court has concluded that prison conditions are subject to Eighth Amendment scrutiny. *See Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 2480, 125 L.Ed.2d 22 (1993). "When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago*

County Dep't of Social Services, 489 U.S. 189, 199-200, 103 L.Ed.2d 249, 109 S. Ct. 998 (1989). The Supreme Court has rejected a claim that the double-celling of inmates had violated the Eighth Amendment, noting that the practice "did not lead to deprivations of essential food, medical care, or sanitation[,] nor did it increase violence among inmates or create other conditions intolerable for prison confinement." *Rhodes*, 452 U.S. at 348. Relying on the Court's decision in *Rhodes*, we have stated that "the *'deprivations' that trigger Eighth Amendment scrutiny are deprivations of essential human needs." Occoquan*, 844 F.2d at 836 (citing *Rhodes*, 452 U.S. at 348) (emphasis in original).

We made a further point in *Occoquan*, namely, that "once a right [under the Eighth Amendment] is established, the remedy chosen must be tailored to fit the violation." 844 F.2d at 841. Appellants have not challenged the district court's findings that the sexual harassment, living conditions, and fire hazards rise to the level of violations of the Eighth Amendment; rather, they assert that certain of the district court's prescriptions go beyond what is required to satisfy "the minimal civilized measure of life's necessities," *id.* at 839, and instead reflect an impermissible effort to transform prisons into "better places." They also complain that the court's mandates are generally far broader than necessary to correct the constitutional violations that the court found to exist.

Because appellants have chosen not to contest the court's conclusions that they had violated the Eighth Amendment in these several ways, our review is limited to an examination of the propriety of the remedies that appellants have challenged. We discuss these alleged violations in turn.

1. *Living Conditions at the Annex*

The district court observed that environmental health

experts retained by both parties agreed that the Annex dormitories are overcrowded. *Women Prisoners I*, 877 F. Supp. at 651 & n.22. The court found that this overcrowding "creates a shortage of sanitary facilities," as measured by the standards established by the American Correctional Association ("ACA"), *id.* at 651-52 & n.23; "increases the spread of infectious disease, produces a . . . noise level [in excess of the ACA standard of acceptability]," *id.* at 652 & n.24 (citations to record omitted); and "creates filthy living conditions, such as dirty floors and moldy bathrooms," *id.* at 652. In discussing the general conditions at the Annex, which included many deficiencies beyond those it had identified as having resulted from overcrowding, the court found that the living conditions were "cruel and unusual because they combine to create an unconstitutionally high exposure to illness or injury." *Id.* at 670.

This case finds a close parallel in *Inmates of Occoquan v. Barry*, 650 F. Supp. 619 (D.D.C. 1986). There, the district court imposed a population cap because it believed that the crowded conditions at the prison increased the risk of disease and produced unacceptable noise levels. *Id.* at 621, 634. In reversing the district court, we stated that "an approach commensurate with Supreme Court precedent would have sought to identify the conditions causing the constitutional violation and order those conditions remedied." *Occoquan*, 844 F.2d at 842. Characterizing a population cap as a "last resort" remedy, *id.* at 843, we explained that

> a population limit, or put another way, a minimum square footage requirement, directly implicates decisions with which the political process is charged. Such fundamental decisions as how many prisons to build and how large to build them—basic decisions regarding the allocation of public resources—are simply outside the domain of federal courts.

Id. at 842-43.

The principal lesson to be drawn from *Occoquan* is the following: when prison conditions are so "soul-chilling," *Rhodes*, 452 U.S. at 354 (Brennan, J., concurring), that they implicate the Eighth Amendment, a district court is empowered to order relief that is specifically tailored to address the violations the court has identified. For example, if ventilation is found to be grossly wanting, an instruction to improve air quality is the appropriate remedy. Indeed, in this case many of the environmental problems that, taken together, the court found "to raise the risk of illness and injury to a constitutionally unacceptable level," *Women Prisoners I*, 877 F. Supp. at 670, are addressed in other parts of the Order. *See, e.g.*, ¶ 104 (ordering a vermin-eradication program); ¶ 112 (ordering improvement of ventilating system); ¶ 113 (ordering installation of drainage system to prevent hazardous accumulations of water); ¶ 123, as amended (ordering inspection and prompt repair of plumbing fixtures). The court, therefore, should have determined the constitutional propriety of a population cap at the margin—that is to say, after its instructions concerning health and safety measures had been complied with.

The Supreme Court has counseled that

> [t]he Constitution . . . "does not mandate comfortable prisons," and only those deprivations denying the "minimal civilized measures of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.

Wilson v. Seiter, 501 U.S. 294, 298, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991) (construing and quoting *Rhodes*, 452 U.S. at 349, 347) (internal citations omitted). This suggests that

standards that the ACA finds "unacceptable" may nonetheless be constitutional. To the extent that conditions at the Annex "are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347. Keeping in mind that the Order includes other provisions dealing with the hazards that it had identified as being a product of overcrowding, we see nothing in the population density itself that can clearly be described as depriving the inmates "of the minimal civilized measures of life's necessities." *Occoquan*, 844 F.2d at 839 (internal quotation marks omitted). We therefore vacate paragraph 102.

2. *Sexual Harassment*

The Supreme Court has stated that "being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1977, 128 L.Ed.2d 811 (1964) (quoting *Rhodes*, 452 U.S. at 347). In this case, the district court found that the pattern of sexual assaults on female inmates, especially when coupled with inappropriate remarks by DCDC employees and invasions of the inmates' privacy, rose to the level of objective cruelty that violated the Eighth Amendment. *Women Prisoners I*, 877 F. Supp. at 664-66. The court specifically found a pattern of "deliberate indifference" to sexual harassment at the three facilities. *Id.* at 665. Part I of the Order is intended to cure these violations by requiring appellants, in manifold ways, to eliminate incidents of sexual misconduct and to improve the Department's response to those incidents that nonetheless occur. *See* ¶¶ 3-19. Appellants challenge three aspects of the prescribed remedies.

Special Officer. Paragraph 5 of the Order directs that one or more members of the staff of the district court's Special

Officer "monitor allegations of sexual harassment at each facility in which women prisoners are housed." Paragraph 8 requires that the DCDC and the Special Officer establish penalties for conduct prohibited by the Department's policy on sexual harassment. Finally, paragraph 13 provides:

> The monitor(s) shall ensure that each reported violation of the policy is thoroughly investigated and documented. The monitor(s) shall submit a final written report to the Warden of the institution; the report shall include factual findings and a conclusion as to whether a preponderance of evidence shows that a violation of the sexual harassment policy occurred. Within 48 hours after the Warden receives the monitor(s)' report, the Defendants shall inform the complaining woman prisoner, in writing, of the outcome of the investigation. The Warden shall take appropriate action as detailed in the schedule of penalties.

Appellants argue that it was an abuse of discretion for the district court to direct its Special Officer to perform the non-judicial, local government function of investigating complaints of sexual harassment, citing *Missouri v. Jenkins*, 495 U.S. 33, 51, 109 L.Ed.2d 31, 110 S. Ct. 1651 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions").

Appellees respond by likening the powers of the Special Officer and her monitors to that of a special master, as contemplated by Rule 53 of the Federal Rules of Civil Procedure. This analogy strikes us as inexact. In unusual circumstances, *see* Fed. R. Civ. P. 53(b) ("[a] reference to a [special] master shall be the exception and not the rule"), the appointment of a special master may be useful to oversee compliance with a court order. *See National Organization for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536,

544-45 (9th Cir. 1987) ("*NORML*") (approving use of monitors to oversee compliance with court order where compliance with past orders has been sporadic); *Ruiz v. Estelle*, 679 F.2d 1115, 1159-63 (5th Cir. 1982) (same), vacated in part on other grounds, 688 F.2d 266 (5th Cir. 1982). Nevertheless, the master's role in such cases has been limited. As the Ninth Circuit noted in approving the use of monitors in a prison reform case,

> [t]he Special Master has no authority to interfere with the operation of the City's jails. The district court appointed the Special Master to investigate, report, and recommend actions that the City could take to ensure compliance with the consent decree. The City agreed to his appointment.

Stone v. City and County of San Francisco, 968 F.2d 850, 859 n.18 (9th Cir. 1992). *See also NORML*, 828 F.2d at 545 ("Masters may not be placed in *control* of government defendants for the purpose of forcing them to comply with court orders.") (emphasis in original).

Here, the staff of the Special Officer are monitors in name only. They do not simply oversee the Department's compliance with the Order; rather, they perform the functions of local authorities, such as the investigation of complaints of misconduct. Contrary to appellees' assertion that "Defendants retain the ultimate authority to determine the proper disciplinary actions," Brief for Appellees at 49, the Order provides that, based on a monitor's report, "the Warden shall take appropriate action as detailed in the schedule of penalties," ¶ 13 (emphasis added); penalties, we might add, that the Special Officer has been given a hand in setting. *See* ¶ 8. The Order therefore cabins appellants' discretion to a far greater degree than appellees represent: rather than merely providing for the monitoring of compliance with the court's decree, the Order effectively usurps the executive functions of

the District. Accordingly, we vacate the paragraphs of the Order that relate to the Special Officer and her monitors.

Inmate Grievance Procedure. The district court noted that the DCDC had established a number of policies, procedures, and regulations regarding sexual misconduct, including an Inmate Grievance Procedure ("IGP"), which allows inmates to file complaints with the authorities. *See Women Prisoners I*, 877 F. Supp. at 640. The court found, however, that "these various policies and procedures are of little value because [appellants] address the problem of sexual harassment of women prisoners with no specific staff training, inconsistent reporting practices, cursory investigations and timid sanctions." *Id.* (citation omitted). To correct this deficiency, paragraph 9 of the Order commands the District to comply with the IGP.

Appellants contend that the IGP is "a provision of local law and the Court has no business directing compliance with it." Brief for Appellants at 43. A federal court, however, is clearly in the "business" of ensuring that violations of rights protected under the U.S. Constitution do not go without a remedy. Appellants have conceded that they have failed to protect female inmates from sexual abuse, in violation of the Eighth Amendment. We fail to grasp, therefore, how paragraph 9 is broader than required to remedy these violations, or how it unduly intrudes on appellants' local government functions. Indeed, this paragraph does not impose any new burdens on appellants; it simply requires appellants to observe their own policies and procedures in the running of their prisons. In light of the foregoing, we reject appellants' challenge to paragraph 9.

Retaliation. Evidence introduced at trial indicated that women who had filed complaints under the IGP were occasionally the victims of retaliation by DCDC employees. The

district court found that the Department did not preserve the confidentiality of those inmates who had filed complaints, and "by leaking private information prison officials coerce women prisoners and staff into silence and insulate themselves from scrutiny." *Women Prisoners I*, 877 F. Supp. at 666. To prevent such abuses, paragraph 7(c) of the Order prohibits

> retaliation for reporting complaints of, assisting any individual in making a report of, or cooperating in an investigation of sexual harassment, regardless of the merits or the disposition of the underlying complaint. Retaliatory conduct includes the following actions taken against a prisoner in response to that prisoner's complaint of sexual harassment . . .: disciplining, changing work or program assignments of, transferring to another facility of, or placing under involuntary protective custody any prisoner.

Appellants contend that this paragraph "sweeps far too broadly" and deprives them of taking any remedial action in response to fabricated claims of sexual misconduct. Brief for Appellants at 42-43.

In *Women Prisoners II*, the court addressed this specific concern. The court explained that paragraph 7(c) "does not prevent the Defendants from legitimately taking punitive action. . . . It simply prevents them from using disciplinary measures to cover up sexual harassment." 899 F. Supp. at 676. In light of this explanation, the Department is free to discipline, without fear of being held in contempt of court, an inmate who has fabricated a charge of sexual harassment or otherwise acted in bad faith in connection with such a charge. Accordingly, we reject appellees' challenge to paragraph 7(c).

3. *Overbroad Relief*

The district court found that general living conditions at the Annex and CTF and fire safety at the Annex violated the Eighth Amendment, conclusions that appellants have chosen not to contest. Parts IV and V of the Order require appellants to improve living conditions and fire safety at the facilities in a variety of ways. While appellants have specifically challenged paragraph 102 (imposing a population cap at the Annex), they further contend that the remedies ordered by the district court to address the Eighth Amendment violations are broader than necessary to correct the violations that the court had found. Indeed, they take issue, if in passing, with paragraphs 103 (replacing roof), 104 (eradication of vermin), 108 (twenty footcandles of prisoner-controlled light per bunk) and 112 (improving ventilation), which, they say, "hardly implicate the Eighth Amendment." Brief for Appellants at 40. We are unable to address questions of overbroad relief that appellants have aired in so casual a manner. Nevertheless, because of the intervening passage of the PLRA and the questions raised by both parties, in their supplemental briefs, as to the applicability of its provisions to this case, especially its provision that a court

> shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right,

18 U.S.C. § 3626(a)(1)(A), we remand this question so that the district court may have the opportunity to address this and other unresolved issues in light of the new statute as applied to the relevant facts.

III. CONCLUSION

Because courts have little experience in the "inordinately difficult" task of running a prison, they should give deference to prison officials where possible, *Turner*, 482 U.S. at 85; and because only a state court can provide an authoritative decision in an unsettled area of state law, a federal court should be reluctant to exercise supplemental jurisdiction over novel questions of local law. With these principles in mind, we have reviewed appellants' challenges to the Order and have disposed of them as follows:

Sexual Harassment. ¶¶ 3-19. Appellants contest the paragraphs relating to the office of the Special Officer, the Inmate Grievance Procedure, and retaliation against inmates for filing IGP complaints. While we reject appellants' objections to the paragraphs concerning the IGP and retaliation against inmates, we accept those relating to the Special Officer and her monitors. We therefore vacate paragraphs 5, 6, and 13 in their entirety and paragraphs 8, 12, 14, and 15 in relevant part as unwarranted intrusions on the functions of local government.

Obstetrical and Gynecological Care. ¶¶ 20-62. With the exception of paragraph 35, which appellants do not challenge, this section of the Order is based on D.C. Code section 24-442. We conclude that the district court abused its discretion in exercising supplemental jurisdiction over these local claims. We therefore vacate this entire section of the Order, with the exception of paragraph 35.

Program Evaluation. ¶¶ 63-101. These paragraphs were intended to remedy inequalities in access to programs that the district court held to violate both Title IX and the Constitution's guarantee of equal protection. Appellants do not challenge those paragraphs that are intended to deal with

unequal access to educational and vocational programs, but challenge all the others. Because we disagree with the court's conclusion that the male and female inmates it was comparing were similarly situated, and because that conclusion was an essential element in both its Title IX and equal protection analyses, we vacate paragraphs 83-92 and 94-101 in their entirety and paragraphs 63-67 and 93 to the extent that they do not involve educational or vocational programs.

Environmental Health. ¶¶ 102-124. The only provision in this part of the Order specifically challenged by appellants is the provision imposing a population cap on the Annex. Because the district court failed to justify the necessity for this "last resort" remedy, we vacate paragraph 102.

Fire Safety. ¶¶ 125-136. Paragraphs 125-130 are intended to deal with fire hazards at the Annex, which the district court found to have violated the Eighth Amendment; paragraphs 133-136 are intended to address conditions at CTF that the court found had violated D.C. Code § 24-442; and paragraphs 131-132 relate to fire safety at both the Annex and CTF. We again conclude that the court abused its discretion by exercising supplemental jurisdiction over these local claims, and we therefore vacate paragraphs 131-132 (insofar as they relate to CTF) and 133-136 (in their entirety). Appellants have not objected to any of the paragraphs intended to address the fire hazards at the Annex; accordingly, we express no opinion as to their propriety.

Finally, we take note of the fact that appellants have charged in very general terms that the district court has ordered them to adopt measures relating to educational programs and other matters that the District can ill afford and which, they say, the court is without authority to impose. Because of the generality of appellants' charges, we are not able to address these particular complaints in this proceeding.

We therefore remand these questions so that they may be resolved by the district court in the context of the PLRA. At that time, appellees will be free to argue the unconstitutionality of the Act. Also, in the interests of judicial economy, appellees may renew their arguments to the court that the substandard medical care and the fire hazards at CTF violated the Eighth Amendment.

It is so ordered.

ROGERS, Circuit Judge, concurring in part and dissenting in part:

Because I find no novel question of law as would pose an obstacle to the district court's exercise of supplemental jurisdiction over the prisoners' request for injunctive relief from violations of D.C. Code § 24-442, I dissent from Part II A of the court's opinion. Further, because I conclude that the court's equal protection analysis is flawed, I would affirm the district court's ruling that the prisoners were denied their Fifth Amendment right to due process by the District of Columbia's giving them unequal access to a variety of programs on the basis of their sex, and therefore dissent from Part II B of the court's opinion.[1/] In other respects I concur in the court's opinion.

I.

On the basis of its identification of a novel question of District of Columbia law, the court concludes that the district court abused its discretion in rejecting the District's invitation

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[1/] Like the court, I do not reach the question, which is one of first impression in this circuit, whether the challenged programs are subject to Title IX. Op. at 30-31.

to decline jurisdiction pursuant to 28 U.S.C. § 1367(c) over the prisoners' claims arising under D.C. Code § 24-224. While I join the court's account of the general structure of the law of supplemental jurisdiction, Op. at 16-18, and I agree that the district court "clearly had the power" to hear the prisoners' claims arising under D.C. Code § 24-442, Op. at 18, I do not agree that an intolerable novel issue posed an obstacle to the court's exercise of jurisdiction. In the terms of the supplemental jurisdiction statute, the prisoners' locallaw claims did not raise novel or complex issues of local law; nor did this case present exceptional circumstances in which there were compelling reasons to decline jurisdiction. 28 U.S.C. § 1367(c) (1, 4) (1994).

Of course, there is some degree of novelty in applying even the hoariest of legal rules to the facts presented in each new case; there is obviously a greater degree of novelty in construing an ambiguous phrase in a newly enacted statute. The question a district court must ask about a local-law claim under § 1367(c)(1), therefore, is not, "Is it novel?" but, "How novel is it?" The reason for asking this question is obvious: the more novel a local-law issue is, the more likely the federal court is to get it wrong, in the sense of deciding the issue differently from how a local court would have decided it. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L.Ed.2d 218, 86 S. Ct. 1130 (1966) (endorsing discretionary dismissal of pendent state-law claims in order to "procure for [the parties] a surer-footed reading of applicable law"). The question of "novelty" is really a question of uncertainty; the issue is how predictable the decision of the local courts would be in light of existing local-law authorities.[2/] Thus, the

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[2/] Thus, even when there is no shortage of authority on a question, the district court may dismiss a local-law claim where a conflict among the (continued...)

appropriate framework for deciding the instant appeal is the standard described in *Financial Gen. Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768, 776 (D.C. Cir. 1982): "the degree of uncertainty in state law is one of several factors that should guide the District Court's discretion," albeit a factor that "should be given considerable weight."

In light of the appropriate standard, this case differs from those relied on by the court. The local-law issues raised by the prisoners' claims are simply not novel. The sole local-law issue cited by the court as "novel"—whether local trial court has the power to impose injunctions when ongoing and systemic violations of a statutorily imposed duty of care have been proved and all of the usual conditions for granting injunctive relief have been met, Op. at 22—is considerably further toward the "certain" end of the continuum than are issues presented by cases such as *Financial General* and *Doe v. Board on Prof. Resp. of the D.C. Ct. of Appeals*, 230 U.S. App. D.C. 367, 717 F.2d 1424 (D.C. Cir. 1983) (per curiam). The issue in the instant case is whether the familiar general power of the Superior Court of the District of Columbia to award equitable relief, D.C. Code § 11-921(a), can be applied to a statute whose substantive content has been explicated by several authoritative decisions of the District of Columbia Court of Appeals. *See* Op. at 19 (collecting local cases). By contrast to this question of institutional power, the courts in *Financial General* and *Doe* were faced with questions concerning regulations and causes of action that had

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[2/](...continued)
authorities leaves the issue uncertain. *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 310 U.S. App. D.C. 409, 48 F.3d 1260, 1266 (D.C. Cir. 1995).

never been addressed by the local courts at all.[3/] In *Financial General*, the district court was faulted for deciding a number of difficult questions involving an attorney's duties in complex corporate transactions when "no court of the District of Columbia has provided any guidance regarding the standards defining an attorney's fiduciary duties, the construction of the conflict of interest provisions of the Code of Professional Responsibility, or the remedies for breach." 680 F.2d at 769. Moreover, the district court abused its discretion by reaching out to decide these questions when all of the federal claims on which original jurisdiction was founded had been dismissed, a factor that is not present in the instant case. *Id.* at 769, 776. As for *Doe*, this court characterized the local-law issues as "whether the Board on Professional Responsibility may subpoena records necessary to performance of its regulatory mandate and what construction to give to Court of Appeals regulations governing the Board's exercise of its asserted subpoena power. . . ." 717 F.2d at 1428. *Doe* thus involved the construction of the grant of authority to a particular local entity, a question that could not be answered with any certainty without a local decision on the subject. Both *Financial General* and *Doe* stand in contrast to the purportedly "novel" issue raised by the prisoners, which is whether well-settled remedies rules of general applicability

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[3/] The same is true of *Grano v. Barry*, 236 U.S. App. D.C. 72, 733 F.2d 164, 169 (D.C. Cir. 1984), also cited by the court, in which the local ballot initiative at issue was "new [and] its meaning ambiguous and sharply disputed." In that case, moreover, plaintiff had not even pled a claim based on local law. The district court had entered an injunction based solely on federal law, which this court vacated. This court held that it would be inappropriate to permit the plaintiff to attempt to reinstate the injunction by adding a local-law claim on remand, now that the federal claims had been dismissed: "Entertaining such a claim now would be somewhat like initially taking jurisdiction over a local law issue when there is no federal claim to which it could be pendent." *Id.*

should be applied to their case.

Nor can there be any doubt that the law of remedies is well-settled in the District of Columbia. The District of Columbia Court of Appeals has repeatedly held that the local trial court enjoys broad equitable jurisdiction pursuant to D.C. Code § 11-921(a). *Hessey v. Burden*, 615 A.2d 562, 571 (D.C. 1992) (collecting cases); *McIntosh v. Washington*, 395 A.2d 744, 748-49 (D.C. 1978). The standards governing the exercise of equitable powers are also well-defined. *Ifill v. District of Columbia*, 665 A.2d 185, 187-88 (D.C. 1995). Finally, the use of those powers to effect institutional change in a variety of local governmental departments and agencies is almost a commonplace in this jurisdiction[4/], as it is in state courts[5/] throughout the Nation. *See* DAN B. DOBBS, LAW OF

[4/] *E.g., Kelly v. Parents United for the D.C. Pub. Schools*, 641 A.2d 159, 163, 165 (D.C. 1994) (affirming permanent injunction and noting that trial court considered "ordering school closures and incarceration with work release for responsible District officials as possible sanctions" when District failed to comply); *In re Savoy*, Nos. 70-4808 & 70-4714, 98 Daily Wash. L. Rptr. 1937 (D.C. Super. Ct. Oct. 13, 1970) (imposing structural injunction on juvenile detention facility); *In re Savoy*, Nos. J-4808-70, etc., 101 Daily Wash. L. Rptr. 317 (D.C. Super. Ct. Feb. 20, 1973) (same); *Pearson v. Kelly*, No. 92-CA-14030, 122 Daily Wash. L. Rptr. 1837 & 1849 (D.C. Super. Ct. Aug. 18, 1994) (appointing receiver over Department of District government for repeated violations of federal law). *See also* DeNeen L. Brown & Lonnae O'Neal Parker, *Schools Again Running Afoul of D.C. Fire Code, Judge Finds*, Wash. Post, July 3, 1996, at B1. *Cf. In the Matter of an Inquiry into Allegations of Misconduct Against Juveniles Detained at and Committed at Cedar Knoll Institution*, 430 A.2d 1087, 1093, 1101 (1981) (Ferren, J., dissenting) (noting power of branch of Superior Court to award sweeping structural injunction in properly pled class action).

[5/] Although the District of Columbia is not a state, its local court system has enjoyed powers commensurate with those of the states for a quarter of

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REMEDIES § 7.4(4) (2d ed. 1993) (describing prevalence of structural injunctions in civil rights cases, including prison reform litigation). Whatever other objections might be raised to the district court's enforcement of local law in this case, therefore, it cannot be said that the court's action was novel. *See Campbell v. McGruder*, 416 F. Supp. 100, 105 (D.D.C. 1975) (for constitutional violation, imposing mandatory injunction that in part required local agencies to remedy violations of local fire, building, housing, health, and food regulations at D.C. Jail); *Campbell v. McGruder*, 188 U.S. App. D.C. 258, 580 F.2d 521, 544 n.47 (D.C. Cir. 1978) (noting that no appeal had been taken from that portion of the injunction).[6/]

The court raises three arguments in support of its conclusion that the district court abused its discretion by entertaining local-law claims that were within its jurisdiction. First, the court notes that injunctions were "never regarded as relief of

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[5/](...continued)
a century. *Palmore v. United States*, 411 U.S. 389, 392 n.2, 36 L.Ed.2d 342, 93 S. Ct. 1670 (1972) ("Congress . . . invested the local courts with jurisdiction equivalent to that exercised by state courts"); *id.* at 409 (noting that the functions of the District of Columbia courts are "essentially similar to those of the local courts found in the 50 States of the Union"). *Cf. McIntosh*, 395 A.2d at 749 n.10 ("Congress . . . intended to transfer to the new local courts all those local judicial powers previously exercised by the United States District Court for the District of Columbia.") The judges of the Superior Court of the District of Columbia would therefore be as surprised as the judges of any state court of general equitable jurisdiction to hear it suggested that they lacked the authority to impose appropriate injunctive relief in the face of ongoing institutional failure to meet a legal duty of care.

[6/] The District did not appeal the district court's finding in the instant cases that general living conditions at the Annex and CTF and fire safety at the Annex violated the Eighth Amendment. Op. at 32.

first resort," cites the ancient rule that equitable relief will not lie if plaintiff has an adequate remedy at law, and points out that "a variety of factors, including the public interest, may weigh against the award of an injunction." Op. at 20. With respect, none of this has anything to do with novelty. Quite the opposite, in fact: the rules cited by the court were formulated by the Chancellor long before the District of Columbia even existed. *See* DOBBS, *supra*, at § 2.5 (reviewing history of equitable requirement of no adequate remedy at law). If the district court was too hasty in awarding equitable relief, that would be an error on the merits of the prisoners' claims having nothing to do with the question whether the claims should have been entertained in the first place. The mistake would be a misapplication of well-settled law, rather than a failure to predict the future development of an unsettled issue in the local courts.

The court's second point is that "we can find no case in which a D.C. court has awarded injunctive relief under section 24-442."[7/] Op. at 20. The theory is that the local courts

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[7/] History suggests an explanation for the absence of local cases in which the District of Columbia courts have imposed injunctive relief upon finding a violation of D.C. Code § 24-442. Until Congress enacted the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358 (July 29, 1970), 84 Stat. 473, the local courts were courts of limited jurisdiction. The transfer of jurisdiction from the federal to the local courts was not completed until 30 months after July 29, 1970. *See id.*, 84 Stat. 479, citing D.C. Code § 16-2901. Litigation seeking injunctive relief in connection with District of Columbia correctional facilities predated the completed transfer and has a long history in the federal courts, premised on violations of the constitution and thus necessitating no recourse to D.C. Code § 24-442. Although the court asserts that D.C. prisoners seeking injunctive relief are no strangers to the local courts, Op. at 20, it cites no cases, and hence there is no reason to assume that D.C. prisoners have sought injunctive relief for violations of D.C. Code § 24-442 and the local

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might classify § 24-442 among causes of action that apply "ordinary tort principles," rather than among those that permit equitable relief. *Id.* at 19. There is no reason, however, to suppose that the local courts would embrace the dichotomy invented by this court, because the availability of equitable relief is an ordinary principle of tort law, assuming that the conditions for such relief have been met. RESTATEMENT (SECOND) OF TORTS § 936 (1979). This is no less true simply because the prisoners' cause of action arises from a statute.[8/]

> Although we examine the text and history of a statute to determine whether Congress intended to create a right of action . . . we presume the availability of all

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[7/](...continued)
courts have ruled that the statute will not support injunctive relief. To suggest, moreover, that a local court would be engaged in "usurpation" were it to find violations of D.C. Code § 24-442 and to invoke its injunctive powers under D.C. Code § 11-921, Op. at 23, goes to the merits and simply ignores the local court's own view of the breadth of its remedial authority and its invocation of them. *See Hessey v. Burden*, 615 A.2d at 571, and supra n.4.

[8/] In an argument not relied on by the court, the District contends that because the local courts have construed the substantive requirements of § 24-442 in light of the analogous federal statute, 18 U.S.C. § 4042 (1994), it would also limit the remedies available under the local law to those available under federal law. *See Matthews v. District of Columbia*, 387 A.2d 731 (D.C. 1978) (citing *Jones v. United States*, 534 F.2d 53, 54 (5th Cir. 19976), *cert. denied*, 429 U.S. 978, 50 L.Ed.2d 586, 97 S. Ct. 487 (1976)). Whereas the federal government has waived sovereign immunity in these circumstances to permit money damages only, however, the municipal immunity of the District is of much smaller scope, and local sovereign immunity law has developed independently from federal sovereign immunity law. *Wade v. District of Colum.*, 310 A.2d 857, 860-61 (D.C. 1973) (in banc). The frequency with which local courts have ordered structural injunctions against District departments and agencies bears witness to this independence.

> appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence.

Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60, 66, 117 L.Ed.2d 208, 112 S. Ct. 1028 (1992). Ordinarily, of course, the remedy for an isolated violation of a duty of care is money damages. Here, however, the plaintiffs alleged persistent violations that threatened ongoing harm to them and prayed for injunctive relief pursuant to local law, *cf. Grano*, 733 F.2d at 189. An injunction is the "appropriate" remedy when such claims are proven.[2/]

The court's holding thus resolves to this: it is intolerably novel for a district court to assume that remedies generally applicable to persistent institutional violations of duties of care will apply to such violations of a particular duty of care until the local courts so apply it—even when there is no local authority remotely suggesting that the general rule would not apply. That cannot be the law. As noted, the application of a well-settled general rule to a current case always presents some degree of novelty. It is the exception, however, for the district court to decline to exercise supplemental jurisdiction, *see* 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3567.3 & n.17 (Supp. 1996), and therefore the application of a general rule in the context of a

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2/ *See, e.g., Bear v. Iowa Dist. Ct.*, 540 N.W.2d 439, 441 (Iowa 1995); *Riha v. Firstier Bank*, 248 Neb. 785, 539 N.W.2d 632, 637 (Neb. 1995); *Stern v. Delphi Internet Svcs. Corp.*, 165 Misc. 2d 21, 626 N.Y.S.2d 694, 696 (N.Y. Sup. Ct. 1995); *Ducham v. Tuma*, 265 Mont. 436, 877 P.2d 1002, 1006 (Mont. 1994); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 978 (Colo. 1993); *Jensen v. General Elec. Co.*, 82 N.Y.2d 77, 623 N.E.2d 547, 553, 603 N.Y.S.2d 420 (N.Y. 1993); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 431 S.E.2d 828, 838 (N.C. Ct. App. 1993).

particular case must be fairly uncertain before a local-law claim may be dismissed. To say that the local-law claims in this case not only may but must be dismissed is to suggest that it is the exercise of supplemental jurisdiction that is the exception.

The court turns finally to another paragraph of § 1367, asserting that the "intrusiveness" of the remedy is "another compelling reason[ ] for declining jurisdiction." Op. at 22 (citing 28 U.S.C. § 1367(c)(4)). Again, the court confuses the question whether the district court was correct on the merits with the question whether the claims should have been heard at all. If the remedy is too intrusive, contains overly "detailed marching orders," Op. at 22, or is not sufficiently connected to proven violations of the District's duties, then this court should vacate erroneous portions of the order, rather than permitting the District to continue illegally inflicting injuries on the prisoners by dismissing the claims altogether.[10/]

The court expands the scope of § 1367(c)(4) to cover ground that is already treated by other doctrines. Section 1367(c)(4) is a catch-all provision; it permits the district court to recognize situations unforeseen by the drafters in which it is appropriate to decline jurisdiction. By using such words as "exceptional" and "compelling," however, Congress indicated that invocations of § 1367(c)(4) should be rare. *Executive Software N. Amer., Inc. v. United States Dist. Ct.*, 24 F.3d

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[10/] The District's challenge to the portion of the district court's remedial order addressing medical care is limited to the assertion that supplemental jurisdiction was improperly exercised. The District has not challenged the scope of the relief ordered. Because of its agreement with the District's position on supplemental jurisdiction, the court does not reach the question whether the district court's order was properly crafted. I also express no opinion as to the propriety of the relief ordered.

1545, 1558 (9th Cir. 1994). In particular, there is no "compelling" reason to decline jurisdiction where other doctrines exist to protect the interests purportedly supporting dismissal. The Supreme Court cases cited by the court that require caution in deciding when to impose a structural injunction and further caution in fashioning such an injunction, for example, create a doctrine of remedies that protects states and localities from overly intrusive and far-reaching federal oversight of local institutions. Op. at 15-16 (citing, *inter alia*, *Lewis v. Casey*, 135 L.Ed.2d 606, 116 S. Ct. 2174 (1996)). Abstention doctrines also recognize the important interests of states in retaining control of complex matters of local administration. *E.g.*, *Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18, 87 L.Ed. 1424, 63 S. Ct. 1098 (1943); *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 29, 3 L.Ed.2d 1058, 79 S. Ct. 1070 (1959). There is no occasion to depart from the carefully delineated boundaries of these doctrines by invoking the very general language of § 1367(c)(4).

The federal courts have an obligation to resolve claims falling within their jurisdiction.[11/] *Quackenbush v. Allstate Ins. Co.*, 135 L.Ed.2d 1, 116 S. Ct. 1712, 1720 (1996). In a few cases, there are good reasons for declining to do so. *Id.* at 1720-21. This is not one of them. The prisoners' claims present a garden-variety prayer for injunctive relief that raises only limited uncertainty in the application of local law. Further, the district court's power to grant broad relief for local-law violations is adequately circumscribed—as it is with respect to federal violations—by the doctrines governing equitable relief in institutional reform litigation. Accordingly,

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11/ Local-law claims falling within the district court's supplemental jurisdiction pursuant to § 1367(a) do not lose their jurisdictional character simply because they meet one of the criteria for discretionary dismissal pursuant to § 1367(c). *LaShawn A. v. Barry*, 87 F.3d 1389, 1396-97 (D.C. Cir. 1996) (in banc).

as the court has done with other portions of the order, I would remand ¶¶ 20-34, 36-62, 131-32, and 133-36 of the order so that the district court might consider the effect of any changed factual circumstances and the intervening passage of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-02 (1996).

II.

The court's equal protection analysis is also flawed. Two people commit the same crime. Each is similarly convicted by a District of Columbia court. In all respects—criminal history, family circumstances, education, drug use, favorite baseball team—they are identical. All save one, that is: they are of different sexes. Solely because of that difference, they are sent to different facilities at which the man enjoys superior programming options. Rather than examine whether the District can justify its separate and unequal treatment of the sexes, however, the court concludes that equal protection principles do not even apply: these two identical prisoners are not "similarly situated." Op. at 23-26.

Not surprisingly, there are flaws in an analysis that concludes that identical people are not similar. The court errs because it starts in the middle, rather than at the beginning. The District consigns similarly situated men and women to separate facilities having different characteristics, acting expressly on the basis of their sex. The court relies on the different characteristics of the facilities to conclude that the otherwise identical men and women incarcerated therein are not similarly situated, and on that basis holds that there can be no judicial comparison of the differences in the treatment accorded to them. The anomalous result is that the more unequal the men's and women's prisons are, the less likely it is that this court will consider differences in the prison experiences of men and women unconstitutional. Indeed, by

maintaining drastically unequal prisons for the two sexes, the government could foreclose any comparison of the rehabilitative programs it provides for the benefit of men and women. This analysis stands the concept of equal protection on its head. The District may not treat men and women dissimilarly and then rely on the very dissimilarity it has created to justify discrimination in the provision of benefits. I therefore dissent from Part II B of the court's opinion.

A.

Proper analysis starts from a feature of the District's prisons that has not been challenged: the physical separation of male and female prisoners. Because the prisoners have not challenged sex segregation, the court must assume that such segregation is lawful: in other words, that this facial sex-based classification "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 135 L.Ed.2d 735, 116 S. Ct. 2264, 2271 (1996) ("*VMI*") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, 73 L.Ed.2d 1090, 102 S. Ct. 3331 (1982)).[12/] What should not be assumed, however, is the propriety of the very practice challenged by the prisoners. Even if the District may properly segregate prisoners by sex, it does not follow that it may segregate them by sex *into unequal facilities*. Put in doctrinal terms, the "important governmental objectives" served by the physical separation of the sexes are not necessarily served by providing different benefits to the segregated populations. Thus, to justify

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[12/] *But cf.* Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182, 1204 (1985) (considering possible justifications for sex segregated prisons and concluding that such prisons violate the Constitution).

depriving women of the programming choices available to men, the District must explain how the deprivation substantially relates to the achievement of an important governmental objective.[13/] *Pitts v. Thornburgh*, 275 U.S. App. D.C. 332, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989); *West v. Virginia Dep't of Corrections*, 847 F. Supp. 402, 406 (W.D. Va. 1994).

The court relieves the District of its constitutional obligation by ignoring how the prisoners came to be segregated. Referring instead to the size, location, and other "physical limitations" of the women's prison facilities, the court concludes that women who inhabit those facilities are not similarly situated to otherwise identical men who are incarcerated elsewhere. Because the District places men and women into physically different facilities on the basis of sex, however, the court's argument that differences in the facilities justify the inferior treatment accorded to women is "notably circular." *VMI*, 116 S. Ct. at 2281.

> [T]he State avoids the fact that *all* State female felons are sent to Huron Valley while *all* male felons are *not* confined in a facility of comparable limitations. In this context, "institutional size" is, frankly, not a justification but an excuse for the kind of treatment afforded women prisoners.

Glover v. Johnson, 478 F. Supp. 1075, 1078 (E.D. Mich.

13/ The Supreme Court has repeatedly emphasized that the sex-based classification itself must further the governmental objective. Thus, it is not enough that providing programs to men furthers a governmental purpose; depriving women of equal treatment must also be substantially related to that purpose. *J.E.B.*, 114 S. Ct. at 1425 ("the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and i npartial trial").

1979). Under the court's rationale, it would almost seem that the District could send men to a country club and women to the Black Hole of Calcutta; a difference in treatment the women received there would be ascribed to their dissimilar situation and would require no further justification. Less fancifully perhaps, the District could provide only stereotypically feminine programming at the women's prisons, such as cooking and sewing classes, while providing men with training in stereotypically masculine pursuits such as construction and carpentry.[14/] Or the District could simply cease providing any programming at all at the women's prisons. *See West*, 847 F. Supp. at 407. In any of these cases, the court apparently would not examine the differences in treatment accorded to men and women. The court's holding that male and female prisoners are dissimilarly situated would preclude constitutional comparison of programming no matter how vast the differences in programming were.

This is not to suggest that population size is completely irrelevant to equal protection analysis. Because women comprise a fairly small (but rising) percentage of felons, it is not reasonable to expect that the menu of programs at a women's prison will be exactly the same as that at a men's prison. This, however, is properly accounted for in determining whether the benefits afforded to women are substantially equivalent to those afforded to men. The court errs by using different population sizes to avoid making a comparison at all. Nor does a "per inmate" numerical comparison suffice. *See* Op. at 27. As the district court recognized, the programs available to men are often different in kind, not only in

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[14/] Constitutionally, it would be equally objectionable if the District provided the women with construction and carpentry classes and the men with sewing and cooking classes.

number, from those available to women.[15/]

The constitutional guarantee as well as Supreme Court doctrine require that when the government confines people and segregates them by sex, it has a duty to justify not only the fact of segregation but also any differences in the facilities into which men and women are segregated.[16/] Therefore, even if the District may constitutionally segregate prisoners by sex, it does not thereby gain the right to treat men and women differently in other respects. Rather, differences in post-segregation treatment—like any other sex-based provision of governmental benefits and burdens—must meet the heightened

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[15/] *See, e.g., Women Prisoners I*, 877 F. Supp. at 657 (noting that work details at the Annex are limited to such things as housekeeping and library work, while men at Minimum have access to work details in carpentry, plumbing, and other skilled tasks); *id.* at 659 (women at CTF have access to associate degree programs, while men at Central, Medium, and Occoquan can earn bachelor's degrees). "Visiting American prisons in the 1990s is like taking a time machine back to the high schools of the '50s, where the boys took Shop, and the girls learned cooking, baking, and sewing—glorified under the name of Home Economics." Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 43 Penn. L. Rev. 2151, 2198 (1995). Another commentator has observed that differences in population do not "account for the inferior quality of the programming. Only discrimination explains why male prisoners are assigned to apprenticeships that lead to well-paying and secure jobs outside of prison while female prisoners are relegated to those which require little to no training." Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 Colum. J. Gender & L. 1, 3 (1995).

[16/] As the *VMI* Court emphasized, even if one assumes that sex segregation is permissible, as segregation by race once was, the government must at least meet the separate-but-equal standard: "In line with *Sweatt [v. Painter*, 339 U.S. 629, 94 L.Ed. 1114, 70 S. Ct. 848 (1950),] we rule here that Virginia has not shown substantial equality in the separate educational opportunities the State supports" at single-sex colleges. 116 S. Ct. at 2286.

scrutiny test outlined in VMI. If a difference in programming were inherent in the fact of sex-segregated prisons, for example, then the same governmental interest that supports sex segregation might support the programming difference.[17/] If it were reasonably feasible to have identical programming in sex-segregated facilities, however, then any differences would not be substantially related to the objectives justifying segregation, and the District would have to justify the difference on some other ground.

The Supreme Court's sex discrimination cases make it clear that the government may not rely on generalizations—even somewhat accurate ones—about women to justify different treatment of the sexes. *VMI*, 116 S. Ct. at 2280; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 1427 n.11, 128 L.Ed.2d 89 (1994). Yet that is what the court permits the District to do, in the guise of requiring the district court to consider "special characteristics" of the male and female prison populations as a whole. For an idea of what "special characteristics" might be, the district court should presumably have consulted the opinion in *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa 1995), cited with evident approval by this court. Op. at 25. *Pargo* noted the following programs devoted to the "special characteristics" of the female prison population in Iowa: "programs about domestic violence, prostitution, and incest survivors"; "a family preservation program" apparently devoted to the needs of prisoners who had been custodial parents; "counseling for postpartum depression"; "classes in anger management and self-esteem"; and unspecified programs for inmates with

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17/ *But cf.* Nicole Hahn Rafter, Partial Justice: Women, Prisons, and Social Control 195-207 (1990) (discussing solutions to historical "inferior treatment" of women prisoners that do not require integration of the sexes).

eating disorders. 894 F. Supp. at 1261. Assuming that the "special characteristics" identified by *Pargo* are more common among women than men, it is unclear why that fact should prohibit a particular woman from choosing to work on a carpentry detail over receiving counseling for post-partum depression.[18] "Estimates of what is appropriate for most women[ ] no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *VMI*, 116 S. Ct. at 2284.

What the Constitution commands, rather, is that the District address directly the differences among individuals that pertain to the purposes of its prison programs, rather than using sex as a proxy for such differences. If, for example, the purposes of prison programs would be served by providing special programs for prisoners with substance abuse problems, the District could offer such programs to drug-addicted prisoners of both sexes. It would not be permissible, however, for the District to presume that women as a group were more likely to have such problems and therefore offer drug-related programming only at women's facilities.[19] The court's similarly-situated analysis encourages the District to take such impermissible actions. By immunizing the District from any comparison of programming at men's and women's prisons, the court's decision may result in having more "woman-appropriate" programming at the women's facilities.

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[18] Nor, for that matter, why a man lacking in confidence should be denied the opportunity to take classes in self-esteem just because men in general may hold themselves in higher esteem than do women.

[19] The District asserted that women had more acute substance abuse problems than men, but the district court rejected the assertion as unfounded in the record. *Women Prisoners I*, 877 F. Supp. at 676. As *J.E.B.* and *VMI* make clear, however, even if the assertion were true, it would not justify using sex as a proxy for drug addiction.

Subjecting programming choices to appropriate equal protection analysis ensures that the District meets its constitutional obligation to give equal opportunities to male and female individuals. The court errs by exempting from comparison the benefits the District provides to men and women prisoners, and thus exempting the District from having to justify its different treatment of the sexes.

B.

Aside from treating the government-imposed segregation of the sexes into different facilities as if were *sui generis* and of no constitutional importance, the court also misconceives what it means for persons to be "similarly situated" for purposes of equal protection analysis. Whether two people (or classes of people) treated differently by the government are similarly situated depends on the purpose for which the government is acting. *Cf. Klinger v. Department of Corrections*, 31 F.3d 727, 734-35 (8th Cir. 1994) (McMillian, J., dissenting) (noting that men and women are imprisoned for the same purpose and are similarly situated "with respect to the goal of rehabilitation"); *Glover*, 478 F. Supp. at 1081-83 (considering goals of incarceration and programming). In *Rostker v. Goldberg*, 453 U.S. 57, 69 L.Ed.2d 478, 101 S. Ct. 2646 (1981), for example, the Supreme Court concluded that men and women were not similarly situated with respect to the purpose of Selective Service registration.

> The purpose of registration was to prepare for a draft of combat troops. . . . Women are excluded from combat. . . . Men and women, because of the combat restrictions on women, are simply not similarly situated *for purposes of a draft* or a registration for a draft. . . . The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration.

Id. at 77-79 (emphasis added). In contrast, the court repeatedly states that men and women prisoners are not similarly situated without ever mentioning the purpose with respect to which they are dissimilarly situated.[20/] It is thus unsurprising that the court fixates on such irrelevancies as the size of the various facilities, which have everything to do with the cost of administering programs and nothing to do with determining which inmates are similarly capable of benefiting from them.[21/] Notably, this was not an error into which the district court fell. *See, e.g., Women Prisoners I*, 877 F. Supp. at 675 (finding women at the Annex similarly situated to men at Minimum with respect to the purposes of programming because "both of these populations are preparing for release into the community and therefore[ ] have the same need to fully prepare themselves for this stage of their lives"). *See also Klinger*, 31 F.3d at 735 (McMillian, J., dissenting) (noting that men and women are equally capable of benefiting from programs).

Determining the purpose of government action before embarking on a similarly-situated analysis is inherent in the

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[20/] The epitome of the court's approach is captured in the concluding paragraph of its analysis: "Given these significant differences in the situation of the women at the Annex and CTF and those of the men at the facilities with which the court compared them . . . we need not examine the programs themselves . . . ." Op. at 30-31.

[21/] "It is well-settled that financial hardship is not a defense to sex discrimination in prisons." *Klinger*, 31 F.3d at 736 (McMillian, J., dissenting) (citing *Shapiro v. Thompson*, 394 U.S. 618, 633, 22 L.Ed.2d 600, 89 S. Ct. 1322 (1969)). *See also Glover*, 478 F. Supp. at 1078 n.2. *Cf. Pitts*, 866 F.2d at 1461-63 (finding District's attempts to ameliorate burden differentially imposed on women probative of lack of invidious discriminatory intent, even though attempts had been frustrated by budgetary constraints).

individual nature of equal protection rights. For example, if the District determined that the purposes of a certain program would be better served if it were offered to prisoners who were relatively close to release,[22] then to determine whether two individuals were similarly situated with respect to the program's purpose would depend on how close each was to release. Asking whether members of that person's sex are generally close to release would not answer the question whether the individual is being treated arbitrarily.[23] It is only the rare situation in which every member of a quasi-suspect class is identically situated with respect to the governmental purpose, as in *Rostker*, in which a court can conclude that any individual class member's claim can be rejected at "the threshold." In other cases, even if general differences between most men and most women can be discerned, the government must still provide an "exceedingly persuasive" justification for categorically treating the sexes differently. *VMI*, 116 S. Ct. at 2275.

The court's failure to consider the purposes of the various prison programs at issue is perhaps understandable, inasmuch as the District has not supplied any. It is the government's burden to come forward with a justification for a sex-based classification, *id.*, yet the District's brief is silent on this point.[24] Without an explanation of the purpose of program-

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[22] This is not to suggest that prisoners can be excluded from programs only by reference to the programs' purpose. Other governmental interests, such as public safety in administering a work furlough program, could support an exclusion.

[23] *See* Schulhofer, *supra* n.13, 143 Penn. L. Rev. at 2201.

[24] The District did not address equal protection until its reply brief. The relevant portion of its opening brief was devoted solely to challenging the

(continued...)

ming, the court is in no position to decide that male and female prisoners are categorically dissimilarly situated with respect to all of the various programs.

C.

Even assuming the government may constitutionally provide separate programs for the sexes, the programs must be substantially equivalent. *VMI*, 116 S. Ct. at 2285-86 (quoting *Sweatt*); *Glover*, 478 F. Supp. at 1079.[25] The district court correctly applied this standard.[26] This does not mean, however, that all women must have access to the

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[24](...continued)
district court's findings of Title IX violations. Most of that discussion concerned whether certain programs were "educational" and thus subject to Title IX. Appellants' brief at 35-37, consisting largely of a lengthy quotation from *Klinger*, added that in any event there was no Title IX violation because female prisoners were not similarly situated to male prisoners. Only in the reply brief did the District extend its argument to cover equal protection.

[25] *But see VMI*, 116 S. Ct. at 2276 n.7 (quoting *Hogan*, 458 U.S. at 720 n.1) ("we are not faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females").

[26] *See, e.g., Women Prisoners I*, 877 F. Supp. at 677 (finding no violation with respect to vocational training and apprenticeships because "women at the Annex and men at Minimum have equivalent access to meager offerings"); *id.* (finding that the District "failed to provide equivalent opportunity in the area of work details"); *id.* (finding that although the industrial programs at the Annex and Minimum differed in content, plaintiffs "have failed to prove that women prisoners . . . do not receive industrial opportunities equivalent to male prisoners . . . ."); *id.* at 686 (¶ 84 of the order) (ordering the District to "provide women at CTF with a range of work opportunities that is equivalent to the range of work opportunities provided to male prisoners at the Occoquan, Central and Medium facilities").

programming choices that are available to any man. Rational sex-neutral criteria, applied evenhandedly to men and women, may be used to determine eligibility for programs. *See J.E.B.*, 114 S. Ct. at 1429 & n.16; Op. at 26 (quoting testimony of Ms. Regina Gilmore and Dr. T.A. Ryan). If custody level is such a criterion, for example, then medium-custody women would not be entitled to programs made available only to minimum-custody men.[27] However, if the District chooses to house minimum- and medium-custody women in the same facility, it cannot use that fact to deny the programs to minimum-custody women. That is, the District may not treat differently men and women who are identical but for sex, something it surely would do by sending minimum-custody women to a facility where they are provided inferior programming to the programming available to minimum-security men.

When the sexes are permissibly segregated, "substantial equivalence" may not require perfectly identical treatment. Some differences may be unavoidable because of the physical separation. Moreover, the peculiar circumstances of prison administration may require different programs for prisoners housed in different facilities. *See Pitts*, 866 F.2d at 1455. While programming decisions are to be made by the District and not by the court, *cf. Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1994) (applying Title IX to prison programs), the District must show that the important penological interests implicated by the policies of its various facilities have a substantial relationship to the denial of access by a female

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[27] In this example, medium-custody women would not be similarly situated to minimum-custody men with respect to the program, just as women who were categorically ineligible for combat were not similarly situated to combat-eligible men with respect to draft registration in *Rostker*.

prisoner to a program available to male prisoners.[28/] *Cf. North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 72 L.Ed.2d 299, 102 S. Ct. 1912 (1982). But as the court would have it, the mere existence of peculiar circumstances at each facility would insulate the government's treatment of the sexes from judicial comparison and the requirement to justify differences under heightened scrutiny standards.

Rather, consistent with due deference to District officials that is consistent with constitutional protections, the District must explain the governmental purpose behind such differences for similarly situated prisoners. This imposes no liability as a result of program-by-program comparisons, *see* Op. at 30, but only recognizes that District officials are subject to the Constitution in its treatment of prisoners.

The district court's analysis accounted for legitimate, sex-neutral criteria in comparing the programs available to men to those available to women. As the court notes, the district court considered "custody levels, sentence structures, and purposes of incarceration" of the prisoners. Op. at 25 (quoting *Women Prisoners I*, 877 F. Supp. at 675). On appeal, the District has not shown that the district court ignored any relevant criterion. In its opening brief, the District lists four criteria: number of inmates at an institution, "length of stay," classification level, and "special characteristics." As previously explained, the first and last of these are

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[28/] Thus, the court mischaracterizes the analysis of the dissent as tantamount to a conclusion that "if male inmates have access to a work detail that is unavailable to women," or "if men can spend an extra hour a day in a gymnasium," then there is a violation of equal protection. Op. at 29.

analytically inappropriate,[29] and the district court expressly considered the other two criteria. In its reply brief, the District focuses almost entirely on the physical differences between the facilities to which it has chosen to assign otherwise identical men and women,[30] yet such physical differences caused by the District itself cannot alone excuse sex-based discrimination. The court, meanwhile, faults the district court for not considering population size, other physical aspects of the sex-segregated facilities, and "special characteristics," which are all improper bases for treating women differently from men. Op. at 25-28. Otherwise, the court cites a list of criteria culled from the testimony of two witnesses, but points to no record evidence that the populations compared by the district court differed with respect to any of them. *Id.* at 26. In any event, the district court did consider at least some of the cited criteria,[31] and the District has not urged error based on any criterion that the district

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[29] In addition, the district court considered and rejected as factually unfounded several of the "special characteristics" mentioned by the District. *Women Prisoners I*, 877 F. Supp. at 675-76.

[30] For example, the District contends that medium-custody women at CTF cannot receive equal treatment to medium-custody men at Occoquan, Central, and Medium because the District has chosen to house the women in the same building as men who have physical impairments or who are undergoing substance abuse treatment.

[31] The criteria mentioned by the two witnesses and considered by the district court included "custody level," "substance abuse information," and "impending factors relating to pre-release." *Women Prisoners I*, 877 F. Supp. at 675 ("the Court will compare prisoners who are similarly situated by virtue of their similar custody levels"); *id.* ("[a] comparison [of women at CTF] to CTF men would be inappropriate because the men reside at CTF for either short-term diagnostic attention of a voluntary 18-month intensive substance abuse program"); *id.* (comparing women at Minimum to men at Annex because both "are preparing for release into the community").

court may have overlooked. Thus, even if one of the criteria mentioned by the witnesses were crucial to the analysis, the proper result would be to remand for the district court to receive further evidence and consider the relevant criterion. *Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995).

For these reasons, I conclude that the District has demonstrated no error in the district court's analysis. The district court correctly found that women imprisoned at the Annex and CTF receive inferior programming because of their sex.[32/] None of the arguments mustered by the court can change the inescapable fact that the District's policies would, solely on the basis of sex, send two otherwise identical people, convicted of the same crime, facing the same sentence, and imprisoned for the same purpose, to facilities offering substantially unequal programming. The court, by ignoring this fact, does not require the District to take even the most minimal steps to assure parity of access to opportunities between the sexes. Equal protection requires more. Unfortunately for the prisoners, and for the Constitution, the court has chosen to follow the example of another circuit that mistakenly believed that the government "could provide, with fidelity to the equal protection principle, separate and unequal educational programs for men and women." *VMI*, 116 S. Ct. at 2286 (reversing 44 F.3d 1229 (4th Cir. 1995)).

Accordingly, I respectfully dissent from Parts II A and II B of the court's decision, and would remand the portions of the order vacated in those parts of the opinion so that the

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[32/] The court, Op. at 27, overlooks the district court's specific findings in regard to educational opportunities, *inter alia*, in support of its conclusion that "women at CFT do not have reasonable opportunities for similar studies [as men] and do not have an equal opportunity to participate in programs of comparable quality [as are available to men]." *Women Prisoners I*, 877 F. Supp. at 678.

district court could consider the impact, if any, of the Prison Reform Act of 1995.

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Civil Action No. 93-2052 (JLG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

December 13, 1994, Decided
December 13, 1994, FILED

OPINION

I. INTRODUCTION

This matter is before the Court after a three-week trial, including the submission of approximately 900 exhibits and hundreds of pages of deposition and transcript testimony. On December 1, 1993, the Court granted the Plaintiffs' Motion for Class Certification pursuant to Federal Rule of Civil

Procedure 23(a), 23(b)(1) and 23(b)(2). The class is defined as *all women prisoners who are incarcerated in the District of Columbia correctional system as of October 1, 1993, and all women prisoners who will hereafter be incarcerated in the D.C. correctional system.*

Women prisoners in the District of Columbia are incarcerated in three facilities: the Lorton Minimum Security Annex (Annex), the Correctional Treatment Facility (CTF) and the Central Detention Facility (Jail). The Annex is a collection of minimum security dormitories in Lorton, Virginia, which presently house approximately 174 women prisoners who are either held for trial, awaiting sentence or within 24 months of release. (R. 8-99; Pls. Exs. 621 at WP00034; 520 at DC003-0902.) CTF is an 800 bed co-correctional facility in the District of Columbia consisting of a series of buildings which house approximately 271 medium custody, general population women prisoners. (Pls. Exs. 638 at 5; 520 at DC0030902.) The Jail is a medium to maximum security co-correctional facility in the District of Columbia housing approximately 168 women prisoners who are either serving sentences of less than one year or who are awaiting trial or sentencing. (Pls. Exs. 621 at WP00031, 520 at DC0030902.)

The Plaintiffs premise their claim for declaratory and injunctive relief on the following grounds: 1) women prisoners at the Annex, CTF, and the Jail are subject to sexual harassment in violation of the Fifth Amendment and the Eighth Amendment; 2) women prisoners at the Annex and CTF receive unequal opportunities to participate in prison programs in comparison to similarly situated men at other correctional facilities in violation of Title IX and the Fifth Amendment; 3) the provision of inadequate obstetrical and gynecological care offered to women prisoners at CTF violates the Eighth Amendment; and 4) the general conditions of confinement and fire hazards at the Annex and CTF violate the Eighth Amend-

ment. Plaintiffs allege that the Defendants are liable for these constitutional violations under 42 U.S.C. § 1983. In the alternative, the Plaintiffs argue that virtually all of the Defendants' actions violate the Plaintiffs' rights under the D.C. Code §§ 24-442 and 24-425.

II. FINDINGS OF FACT

A. Sexual Harassment at the Jail, CTF and the Annex

The evidence demonstrates that there have been many incidents of sexual misconduct between prison employees and female prisoners in all three of the womens' facilities in this case. The level of harassment involves forceful sexual activity, unsolicited sexual touching, exposure of body parts or genitals and sexual comments. (R. 2-3.)

Within the D.C. Department of Corrections (DCDC) there is a general acceptance of sexual relationships between staff and inmates which creates a "sexualized environment" where "boundaries and expectations of behavior are not clear." (R. 5-78.) Based on conversations with DCDC employees, Mr. Howard Ray Jr., former administrator of CTF, stated, "You just get this sense that [sexual misconduct] has always happened and it is always going to happen." (Ray Dep. I at 112.)

The most disturbing evidence of sexual harassment involves sexual assaults on women prisoners and the inadequacy of the Defendants' response to these attacks.[1/] On October 31, 1993, at about 2:30 a.m., a correctional officer at the

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[1/] By Court Order, the women prisoners were permitted to use "Jane Doe" pseudonyms in this case in order to preserve their privacy and protect them from retaliatory actions by other inmates and by DCDC employees.

Jail, sexually assaulted Jane Doe Q while she was a patient in the infirmary. (R. 1-75 to 1-80.) The officer fondled her breasts and vagina, tried to force her to perform oral sex and then raped her. On December 9, 1993, at approximately 5:30 a.m., a correctional officer at CTF forced Jane Doe RR to perform oral sex on him while Jane Doe RR attempted to empty trash as part of a work detail. (R. 6-123 to 24.) The individual officers who assaulted Jane Doe Q and Jane Doe RR warned the women not to report the attacks. (R. 1-80; 6-126.)

Jane Doe Q and Jane Doe RR were placed in protective custody after they filed complaints. (R. 1-86; Pls. Ex. 502 at 11.) Jane Doe RR explained the problems with this arrangement: "[Protective Custody] is just like being punished. It's the same place where you go if you do something . . . . You stay on lock 23 hours every day. . . . I didn't [feel safe] . . . because the person that is supposed to be watching us, [is] never at the desk hardly . . . I don't consider that as being protected." (R. 6-132 to 6-133.)

In addition to rape and forced sodomy, women prisoners endure other varieties of sexual assault. In September 1993, a correctional officer at CTF grabbed Jane Doe W's buttocks and vagina while he escorted her from the medical unit where she had received prenatal care. (R. 1-36 to 1-38.) A CTF foreman tried to rub up against Jane Doe Z, and steward hands and different officers fondled women prisoners' breasts, legs, arms and buttocks. (R. 7-64.) Another CTF officer attempted on several occasions to fondle Jane Doe K's breasts, vagina and buttocks in the television room. (R. 6-110.) A teacher in the print shop would frequently try to pull Jane Doe OOO to him and kiss her. (R. 1-112 to 113.) An officer in the garment shop attempted to paw and kiss women prisoners.

(R. 6-113.) [2/]

Another problem at CTF and the Annex is a lack of privacy. Some male officers fail to announce themselves before appearing in areas where women undress. (R. 3-16; 1-56 to 1-58; Y. Jackson Dep. at 32-33, 43.) In addition, the structural design of CTF permits male inmates a view of women's rooms while the men are in the recreation yard or in their own cells. (R. 9-131.) Defendants claim that they allow women to cover the window while they are dressing, but the Court did not see evidence of a written policy to this effect. (R. 9-53; 9-131.)

Women prisoners at all three facilities are the targets of sexual comments. Steward hands and officers at CTF feel free to direct sexual comments at women prisoners. (R. 7-64, 66.) One officer in particular discovered that Jane Doe V was going to take a shower and said, "Well, you go ahead and do that and I'll be in there to stick my rod up in you." (R. 4-68.) Male prisoners and correctional officers at the Annex also direct sexually explicit comments toward women prisoners. (R. 1-117; 6-115.) Officers at the Jail verbally harass women by making derogatory references about women prisoners' breasts and buttocks. (R. 1-88.)

The DCDC has policies and procedures designed to address sexual misconduct. In the Defendants' Basic Regulations for all Employees, employees are cautioned not to become intimate with prisoners. (Defs. Ex. 26 at 5-6.) The Defendants also have created the Inmate Grievance Procedure (IGP) under Department Order No. 4030.1D (Pls. Ex. 117.),

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[2/] The print and garment shops are located at the Central Facility. Women prisoners from the Annex work in these shops to perform industrial labor.

the D.C. Personnel Policy on the Employee and Inmate Relationships under Department Order No. 3350.1, (Defs. Ex. 53.), the Sexual Harassment in the Workplace policy under Department Order No. 3310.4B (Pls. Ex. 107.) and the Procedure for Handling Institutional Persons Suspected of Committing Crimes in the Institutions under Department Order No. 5410.1. (Defs. Ex. 27.) These regulations are supposed to be taught during a seven-week, pre-service training program and each year during a 40-hour in-service training program. (R. 8-125 to 26.)

Though the DCDC has established an Inmate Grievance Procedure, (R. 8-127 to 28), procedures for filing an IGP form are not posted on each one of the units as required, and requests for written reports present an obstacle for illiterate women who wish to file a complaint. (R. 2-44 to 2-45.)

These various policies and procedures are of little value because the Defendants address the problem of sexual harassment of women prisoners with no specific staff training (Stempson Dep. at 182-83.), inconsistent reporting practices, cursory investigations and timid sanctions. Since training is confined to sexual harassment in the workplace (Riddick Dep. at 92; Pls. Exs. 111, 115.)[3], employees confront the harassment of women prisoners in different ways. Ms. Toni Perry, the former Director of the Women's Program at CTF, would present an inmate's allegations to the Director of the DCDC instead of reporting to the administrator of the facility. (Perry Dep. at 162.) Mr. James Derr, a staff assistant at the Annex,

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[3] The employee manual defines sexual harassment as "any unwelcome and/or repeated sexual advances, request for sexual favors, or any other verbal or physical conduct of a sexual nature. It is illegal when: 1) it is used as a condition of employment; 2) it is used as the basis of an employment decision; 3) it interferes with the work atmosphere or performance of an employee."

said that because there are corrupt people in the system "you almost have to be careful as to who you give your information to, . . . whether they be higher-ups or superior to you or not . . . . I'm reluctant to give much information to anyone of our system." (Derr Dep. II at 88, 97-98.) Ms. Christine Welch, a substance abuse counselor at CTF, believes that an inmate would have to tell her something two or three times before Ms. Welch would report it. (Welch Dep. at 62-63.) When a woman prisoner complained to Ms. Welch about an instance of sexual harassment, she told the woman prisoner to "just quit her job and program, because she really didn't need to work." (Welch Dep. at 63-64.)

Reports of sexual misconduct also do not remain confidential. (Perry Dep. at 164; R. 4-50.) After Jane Does Q and RR reported their assaults, the incidents quickly became a matter of public knowledge among prisoners and staff. (R. 1-86; 6-137.) Officers spoke with Jane Doe RR about her attack and gave her the impression that they regarded it as a "joke" or "gossip." (R. 6-137.)

The Defendants do not adequately investigate the incidents of sexual misconduct because there is no policy and because the investigations are not taken seriously. (Krull Dep. at 227; Derr. Dep. II at 105-06; Y. Jackson Dep. at 161.) If the DCDC does not have first-hand knowledge of an incident, Mr. William Plaut, the Deputy Director of Operations and Acting Deputy Director for Programs,[4/] believes that they must wait for the conclusion of a police investigation or the conviction of the accused employee before they can take any action. (R. 8-132.) On many occasions while Mr. John Henderson

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[4/] Mr. Plaut held the position of Associate Director for Institutions when he dealt with some of the incidents of sexual misconduct alleged in this case.

worked as the Administrator of the Jail, police would not respond to his initial call to investigate and he would not make any further attempts to contact them or conduct an independent investigation. (Henderson Dep. at 146.) In a case involving an allegation that an officer had impregnated an inmate through coerced sexual intercourse, Mr. Henderson referred the case to the police and did not learn of the results until four months after the police concluded their investigation. (Henderson Dep. at 94-95, 108-110.) Mr. Henderson did not conduct his own investigation or discuss the case with the accused officer who was eventually reassigned to the Occoquan Facility. (Henderson Dep. at 108-10, 113-15.)

Ms. G.H. McCathorine,[5/] Associate Director of Programs for the DCDC, responds to complaints by assigning Deputy Warden L.C. Jones[6/] to a case and then she waits for the results of his investigation. (McCathorine Dep. at 242.) When Jane Doe RR discussed incidents of sexual misconduct with Deputy Warden Jones he discouraged her from talking to him too often because people would view her as an informer. (R. 6-144 to 145.) He also assured Jane Doe RR that if she did not provide any names to one of the Plaintiffs' lawyers, he would work toward getting her released from jail. (R. 6-144.) Though Mr. Jones himself had an allegation of sexual misconduct pending against him, his superior Ms. McCathorine claimed that she was not aware of this. (Jones Dep. at 169-70; McCathorine Dep. at 230.) Mr. Jones claims to have certain difficulties determining whether

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[5/] Some documents in the record refer to Ms. McCathorine by her former name, Ms. Gwen Washington. (R. 8-83.)

[6/] The record contains references to Mr. Jones in his position as Lieutenant and Captain. Mr. Jones, however, is now the Acting Deputy Director for Operations at the Correctional Treatment Facility. (R. 8-145.) Mr. Plaut referred to him as Deputy Warden Jones. (R. 8-146.)

harassment has occurred. Concerning an allegation against one officer, he expressed disbelief that a man the officer's age would be attracted to an openly homosexual inmate.[7/] With respect to harassment in the culinary section of CTF, he believes that he cannot adequately conduct an investigation without a camera. (Jones Dep. at 31.)

Though Ms. Jennie Lancaster, a jail administrator and the Plaintiffs' expert penologist, has been able to reach a conclusion in approximately 90 percent of all sexual harassment cases she has confronted, the record demonstrates that the Defendants often fail to reach any conclusions in their investigations. (R. 5-74, 76.) Jane Doe Q reported her attack to the administration and the police, but at the time of trial, she did not know the results of the investigation or whether any action was taken against the officer who assaulted her. (R. 1-85 to 86.) Jane Doe RR filed an IGP, (Pls. Ex. 502), and later filed criminal charges yet neither the CTF administration nor the police has informed Jane Doe RR about the status of the investigation into the incident; and to her knowledge, no disciplinary action has been taken against the officer who assaulted her. (R. 6-136.) Jane Doe OOO, along with five other women, complained to the Administration about sexual harassment by a teacher in the Print Shop yet there is no evidence that the administration took corrective action. (R. 1-114.) Jane Doe K complained to CTF staff about the incidents of CTF officers pawing women prisoners but the administration took no action against the officers. (R. 6-111.)

When the evidence is reduced to a dispute between an

[7/] The specific testimony of Lieutenant Jones was as follows: "This man is 60 some years old. I'm saying, wait a minute. But granted, now, I'll give you the fact that maybe he might be turned on by that fag, I don't know. I just do not. I find it hard to believe." (Jones Dep. at 142.)

inmate's allegation and an employee's version of events, the Defendants generally side with the employee. (R. 8-133 to 34; *See, e.g.*, Pls. Exs. 74, 76, 77, 79, 86.) A typical example is the administration's response to Jane Doe W's IGP in which the administration summarily concludes that her allegations "could not be validated." (Pls. Ex. 69 at 2-4; R. 1-40, 43.)

When the Defendants do suspect that an employee is guilty of sexual misconduct they possess a range of sanctions to use against an employee, (Defs. Ex. 25), but they often simply reassign the employee to a different facility. (R. 5-74 to 5-76.) Mr. Plaut stated,

> There are . . . cases where we believe the inmate. In fact, the inmate's story in some cases is more credible than the employee's story, but you cannot take adverse or corrective action against the employee because you believe the inmate over the employee. In cases like that we relocate the employee and make sure the employee does not come in contact with that inmate, does not work in that institution.

(R. 8-134.) Mr. Plaut stated that he has personally reassigned "many, many" officers who he believed may have been engaged in sexual misconduct. (R. 8-135.) The officer who assaulted Jane Doe W continued to work on Jane Doe W's unit after the incident (R. 1-47) and was transferred to the Maximum Security Facility on May 8, 1994. (Pls. Ex. 675.) Jane Doe K complained to staff about the harassment by the officer in the garment shop (R. 6-113; Pls. Ex. 66 at 5.) and that officer was transferred to another post. (R. 8-153, 6-114.) When Yvette Jackson, a correctional officer at the Annex, reported the problem of an officer entering women's areas without announcing his presence, Captain Larry Corbett assured Jackson that he would try to keep the officer from

coming up to the Annex as much as possible. (Y. Jackson Dep. at 38.)

Reassignment does not always occur. When Jane Doe RR returned to CTF in May 1994 the officer who assaulted her still worked at the facility. (R. 6-135.)

The effect of sexual harassment on women prisoners is profound. The abuse has a significant impact on a woman's concentration, and it lowers confidence and self-esteem. (R. 2-57 to 2-58.) It leads to irritability, anxiety and nervousness. Women may be angry that the incident is happening and fearful that they will be continually exposed to it. (R. 2-58.) Women prisoners who experience sexual harassment report significant depression, nausea, frequent headaches, insomnia and feelings of fatigue. (R. 2-58.) Those who report the harassment often experience increased stress and may end up becoming isolated from other women in the institution. (R. 2-58.) Women can feel self-doubt, and disillusionment at the failure of the organization to protect them. Women prisoners lose confidence in the system and may decide not to complain about additional incidents. (R. 1-118; 6-115.)

For women who have a history of sexual abuse the harassment often brings back memories of the prior abuse.[8/] (R. 2-61 to 62.) This can lead to severe depression, reinforcement of a "victim" self-image and a belief that, as in childhood, they have no control over their lives. (R. 2-61.)

[8/] Dr. Susan Fiester, Plaintiffs' expert in the area of sexual harassment and sexual misconduct, testified that among the general female incarcerated population, between 70-to-80 percent have been sexually abused at some point in their lives. Dr. T.A. Ryan, the Defendants' expert penologist, testified that "in large measure, a female offender population will come from a history of abuse." (R. 11-40.)

B. Obstetrical and Gynecological Care at CTF

Women prisoners at CTF, like most female inmates, experience a higher rate of illnesses than the general population. (R. 3-52 to 3-53.) Specifically, women inmates have a greater risk of contracting sexually transmitted diseases such as syphilis, AIDS,[2/] or gonorrhea, and other illnesses such as cervical cancer and sterility due to infection. (R. 3-53.) The reason for the high rate of disease stems from the fact that the lifestyle of a typical woman prisoner does not include good health habits. (R. 3-52.)

Doctors should examine people in a "high risk" health category much more frequently and they should also anticipate complications, particularly in the case of prenatal patients. (R. 3-57 to 3-58.) Failure to monitor these women closely results in an unnecessary degeneration of their health and the health of a fetus if they are pregnant. (R. 3-58, 3-60.)

Adequate gynecological care begins with a thorough examination. This includes a pelvic examination, a thorough gynecological-obstetric history, a PAP smear, cultures for gonorrhea and chlamydia, a test for syphilis, a thyroid examination, breast examination and an examination of the rectum, abdominal contents and pelvic organs. (R. 3-59.) In certain instances a test for Hepatitis B should be done. (R. 3-59-60.) Failure to give timely examinations can shorten a patient's life in the case of AIDS, or it can result in infertility in the case of chlamydia and gonorrhea. (R. 3-63 to 64.) It

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[2/] The Commission of Public Health, Office of Sero Prevalence/ Preventive Health Care, conducted a study utilizing CPH protocol of random sampling. The study demonstrated that 9.9 percent of the females tested positive for HIV. (Pls. Ex. 660.) AIDS patients run a higher risk of developing opportunistic infections such as pneumonia or vaginal yeast infections. (R. 3-53 to 3-54.)

is best if an institution establishes a list of necessary exams as part of a protocol for health care providers to follow. When an organization faithfully follows a protocol, people "develop a habit of doing things properly." (R. 3-72.)

The DCDC policy states: "All new arrivals . . . will be seen within 24 hours to determine the health status of the resident and to take any steps necessary to protect the health and safety of the resident and general population." (Pls. Ex. 563.) Also, "it is the policy of Health Services to provide clinically appropriate periodic health examinations and follow-up care to inmates under the [DCDC]." (Pls. Ex. 483.)

These policies are not followed at CTF.[10/] (R. 3-76 to 3-77.) Women prisoners during intake are not given pelvic exams or breast exams. (R. 14-12.) Women must also request PAP smears through sick call. (R. 14-12.) Out of a sample of 70 women prisoners, 9 did not have any documented PAP smears. (R. 3-67.) In addition, there was no documentation as to the last PAP smear these women had. (R. 3-67.) Approximately 12 women out of the sample of 70 were HIV positive and none of these women had PAP smears done at six-month intervals. (R. 3-73.) PAP smears should be taken every one or two years for non-risk patients. (R.

[10/] Defendants claim that pelvic examinations, pregnancy tests, PAP smears and tests for sexually transmitted diseases are not routinely performed at CTF because they are supposed to be done at the Jail. (R. 13-128 to 130.) At CTF, a physician's assistant reviews the medical record for missed tests and initiates tests for pregnant prisoners. (R. 14-95 to 96.) But an investigation of medical care at the Jail indicates that the Defendants often did not conduct these tests. The Special Officer's Report on Medical Care at D.C. Jail, *Campbell v. McGruder*, CA. No. 1462-71 (D.D.C.), February 2, 1994, at 42-43. Dr. Charles Hall, an OB/GYN physician at CTF claimed that he was not aware of these findings. (R. 14-37 to 39, 42 to 43.)

3-67, 14-117.) But high risk patients, such as women with advanced stage HIV or previous abnormal PAP smears, should be checked at least every six months. (R. 14-117.) A woman who is compromised with AIDS can go from a negative PAP smear to invasive cancer within a year. (R. 3-70.)

Defendants do not routinely test women prisoners at CTF for sexually transmitted diseases. (R. 3-74; 14-12.) In 7 out of 47 reviewed cases, either a gonorrhea culture or chlamydia culture was missing. (R. 3-74.) In some cases women were not tested for syphilis. (R. 3-74.) Failure to screen for chlamydia may result in sterility for a woman or eye infections and pneumonia for a newborn baby. (R. 3-74 to 3-75.) Advanced gonorrhea may result in sterility, abscessed ruptures and peritonitis. (R. 3-75.) Syphilis may lead to an aortic aneurysm, dementia or psychoses.[11/] (R. 3-76.)

Even when women prisoners receive medical tests, the follow-up care of inmates at CTF is inadequate. In one instance a woman with an abnormal PAP smear declined further testing because she believed that she would be released soon and would get better care from a private doctor. (R. 3-78.) She was not released, however, and received the tests three months after the time prescribed. (R. 3-78.) In another case, doctors performed a biopsy on a woman after a very abnormal PAP smear. The woman was subsequently released from custody without the record indicating that any medical advice was given to her. (R. 3-78.)

[11/] On the subject of testing, no test has been as regularly administered as the tuberculin skin test. (R. 3-70.) Dr. Major, the Plaintiffs' expert in the field of obstetrics and gynecology, stated that the reason for this might be that tuberculosis poses a threat to prison personnel as well as other inmates. (R. 3-70 to 71.)

The Plaintiffs presented women prisoners who provided further evidence of the Defendants' failure to render adequate follow-up care. Jane Doe II is a CTF prisoner who is HIV positive and suffers from the human papilloma virus (HPV).[12/](R. 2-158, 172.) While at CTF in September 1992, Jane Doe II experienced abnormal vaginal discharges and painful discharges of fluid from her left nipple. (R. 2-158, 166.) At her initial screening, she complained to a CTF physician's assistant about her breast problem. (R. 2-164.) On September 16, 1992, she saw Dr. Charles Hall at the CTF infirmary. (R. 2-165.) Dr. Hall prescribed medicine for the vaginal discharge and scheduled an appointment for her at the Howard University surgery clinic at the Jail approximately three weeks later. (R. 2-166.) She missed the next two appointments because the Defendants were late in transporting her. (R. 2-166 to 167.)

Despite her continued complaints to CTF medical staff[13/] and a worsening condition, Jane Doe II did not receive an examination until November 1993, more than one year after complaining about her condition. (R. 2-167 to 169.) Doctors performed a biopsy on March 23, 1994 at D.C. General. (R. 2-170.) The five month wait for the biopsy occurred because CTF staff on approximately four occasions scheduled her for

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[12/] This is a virally caused, sexually transmitted disease. It results in warts on the surface of external and internal genitals. It is treatable but potentially dangerous. Of the fifty or sixty strains of the virus, about eight to ten are premalignant. Very often it shows up on a PAP smear. (R. 3-79.)

[13/] The lack of confidentiality at CTF convinced her not to participate in the sick call procedure. Sick call involves a group of physician's assistants who make daily triage rounds on the units and examine inmates who have placed their names on a sick call list. The first time Jane Doe II participated in this procedure a physician's assistant placed her file on a cart in open population. (R. 3-22.)

the wrong medical facility. (R. 2-170.)

The Defendants' medical expert and Dr. Charles Hall believe that the Defendants' response to Jane Doe II's breast problem did not meet minimal medical standards. (R. 14-26 to 27; 14-119 to 120.) According to Dr. Major, Jane Doe II's breast discharges warranted only a simple cytology smear of the drainage which could easily have been performed at the CTF clinic instead of the clinic at the Jail. (R. 3-80 to 3-81.) In May 1993, she requested a PAP smear from the CTF medical staff because she discovered lesions on her buttocks and experienced irregularities in her menstrual cycle. (R. 2-171.) She did not receive a test until November 1993 and the results of the test were abnormal. (R. 2-171 to 172.) In January 1994, Jane Doe II received a culdoscopy which revealed no abnormalities.[14/] (R. 2-172 to 173.) By June 1994, she still had not seen a gynecologist at CTF since the PAP smear and culdoscopy. (R. 2-173.)

The case of Jane Doe V provides another example of a breakdown in medical treatment. In June 1993, Jane Doe V requested a PAP smear and a mammogram because a physician's assistant at the Jail informed her that she had polycystic breasts. (Pls. Ex. 254 at 4.) Three separate physician's assistants at CTF told her that she could not receive a mammogram because she was not thirty-five years old. (R. 4-94.) She finally saw a gynecologist about her breast in September 1993 but still did not receive a mammogram. (R. 4-95.) Only after Jane Doe V threatened to file a complaint did she receive a mammogram. (R. 4-95.)

[14/] A culdoscopy is the direct visual examination of the female viscera through an endoscope introduced into the pelvic cavity through the posterior vaginal fornix. *Encyclopedia and Dictionary of Medicine, Nursing and Allied Health* 258-59 (2d ed. 1978.)

Defendants' policy on health promotion and disease prevention states: "Health Services will provide health education and training in self-care skills to all inmates . . ." (Pls. Ex. 570.) The health education at CTF, however, is "grossly inadequate." (R. 3-86.) Dr. William Hall, Assistant Director for Health Services, stated that the DCDC does not have any pamphlets or videos that deal specifically with obstetrical and gynecological care. (William Hall Dep. 181-82.) The only evidence of health education that Plaintiffs' medical expert found, was a breast self examination chart located on the back of one of the rooms in the infirmary. (R. 3-86 to 3-87.)

According to Dr. Major, records at CTF demonstrate "too many records of refusal of treatment." (R. 3-84.) The number of women refusing treatment could be reduced by proper counseling as to the importance of treatment. (R. 3-84.) In one case, a pregnant woman with syphilis refused treatment for two months simply because she did not like injections. (R. 3-84 to 3-85.) Education is particularly important in the area of breast self-examinations where over the past ten years more breast lumps have been discovered by women than by their doctors. (R. 3-88.)

The DCDC has a written policy which requires the Defendants to provide comprehensive medical care and counseling to all pregnant women prisoners. (Pls. Ex. 2.) But even in 1994 they recognized a "lack of gender specific care in the areas of prenatal and postnatal education and care." (Pls. Ex. 434 at 5.)

In the area of abortion counseling, the written policy of the DCDC provides: "The Institution Administrators shall provide each inmate with medical and social counseling to aid her in making the decision to have an elective abortion. Religious counseling will be made available should the inmate desire it."

(Pls. Ex. 5.) Women prisoners receive abortion counseling from Ms. Marydot Thomas, a licensed nurse, as well as from the clinic performing the abortion. (R. 13-89.)

In rendering prenatal care, the Defendants have not followed any written protocol.[15/] (R. 13-99.) A protocol or use of a Problem Oriented Prenatal Risk Assessment (POPRAS) form is a crucial element of prenatal medical treatment. (R. 3-94, 14-129.) This form takes health care providers through a step-by-step approach to treating a prenatal patient. Dr. Charles Hall, who is responsible for prenatal care at CTF, told Dr. Major during an interview that there was no written protocol at CTF and that the "protocol" was "in his head". (R. 3-95 to 96.)

After Dr. Major's interview with Dr. Hall, Dr. Eliza Taylor asked Dr. Hall to prepare a prenatal protocol for CTF. (Pls. Ex. 457; Charles Hall Dep. at 122-23.) The protocol, however, is not nearly sufficient. (R. 3-97.) For example, it requires an Alpha Feto Protein test "at appropriate time," which might mean one thing to a doctor and another thing to a nurse practitioner or physician's assistant. (R. 3-98.) It does not indicate when or how an ultrasound test should be performed. (R. 3-98.) The protocol vaguely prescribes "tests, management and referral as needed based on the judgment of the health care provider." (Pls. Ex. 457.)[16/]

[15/] In addition, Dr. Clark found lapses in prenatal documentation which caused him concern because documentation is a crucial part of medical care. (R. 14-167 to 168.)

[16/] Another related example of inadequate medical documents is the physical profile which Defendants use at CTF. (Pls. Ex. 646.) The document displays a front and back sketch of a man's anatomy. On the sketch displaying a frontal view, the genitals are crossed out. On the

(continued...)

Dr. Major found eleven instances where women did not receive prenatal care until after two or more months from the start of pregnancy. (R. 3-99 to 3-100.) General standards require prenatal care to commence no later than two months after pregnancy begins. (R. 3-99.) Care within the first two months enables doctors to ameliorate gestational problems such as anemia, hypertension, diabetes and poor weight gain or infant growth. (R. 3-101.) The standard of care for prenatal appointments is monthly visits for the first six months, bimonthly visits for the seventh and eighth months and weekly visits for the last month. (R. 14-126.)

The experiences of Jane Doe QQQ and Jane Doe L offer examples of inadequate prenatal treatment. On a Saturday in January 1994, Jane Doe QQQ experienced vaginal bleeding and was sent to D.C. General where a nurse informed her that she had to wait in the lock-up. (R. 4-23 to 24.) Jane Doe QQQ refused to go because as she explained: "I believed I was threatening a miscarriage, and [in] lock-up, I would have been on a metal bed without a mattress and I would have been in a cell . . . for five or six hours." (R. 4-24 to 4-25.) She finally returned to CTF that night and did not see a doctor until the following Monday. (R. 4-26.)

Jane Doe L was five months pregnant when she arrived at CTF on March 22, 1993. (R. 2-134.) She received two examinations and a sonogram before delivery even though she made requests for a prenatal examination through sick call. (R. 2-136 to 2-138; 14-20 to 14-24; Pls. Exs. 681, 682, 683.)

16/(...continued)
sketch which provides a rear view someone wrote, "Use this as a female." Dr. Major found this document in about 20 to 25 percent of instances when the chart was used. (R. 3-138 to 3-139.)

On the night before delivery, Jane Doe L experienced labor pains and was taken to the hospital. (R. 2-139.) But D.C. General sent her back because her water had not broken and she was not dilating. (R. 2-139 and 140.) Despite the fact that her contractions were five minutes apart, the staff at CTF placed her in handcuffs and leg shackles and sent her to a prescheduled court appearance. (R. 2-141 to 142.) The Marshals at the courthouse sent her back to CTF because she could not walk due to labor pain. (R. 2-143.) At CTF, she spoke to a nurse who knew about her trip to D.C. General but only offered her some aspirins and told her to prop her feet up and rub her stomach. (R. 2-143 to 2-144.) Jane Doe L went to her cell and delivered her baby shortly thereafter. (R. 2-146.) Jane Doe L had not yet purged the afterbirth from her body when guards placed her in handcuffs and leg shackles and sent her by ambulance to D.C. General. (R. 2-147.)

Jane Doe L's experience with shackling is not unusual. When Defendants transport pregnant women prisoners on medical visits they customarily place women in leg shackles, handcuffs and a belly chain with a box that connects the handcuffs and belly chain. (R. 4-14; 6-98 to 6-99; 2-141 to 2-142; 2-147; 1-61 to 1-62.) A physician's assistant stated that even when a woman is in labor "their ankles and their hands are cuffed." (Ali Dep. at 162-63.) Leg shackles are the least inconvenient method of shackling and chest boxes, arm shackles and wrist shackles increase the chance for injury. (R. 4-7.) Deputy Warden Jones stated that he does not use leg shackles on a woman in her third trimester of pregnancy "because there's a possibility she might trip." (Jones Dep. at 16-17.) Dr. Major stated that unless a pregnant prisoner is assaultive or an escape threat the need for shackling is unnecessary. (R. 4-6 to 7.)

In the area of prenatal nutrition, the Defendants' written

policy states: "Pregnant females shall be placed on a nutritionally balanced diet that includes milk and a late evening snack . . . . Any dietary recommendations made by D.C. General Hospital shall be followed." (Pls. Ex. 2 at 2.) Records of some women reveal abnormally low weight gain which could possibly mean that the nutritional needs of women have not been met. (R. 3-112; *See* R. 1-59 to 1-60.) On one occasion, Defendants refused to give a dietary supplement even though D.C. General prescribed it. (R. 4-27 to 4-30, 14-28.) There were also incidents where the CTF pharmacy ran out of vitamins due to storage problems. (R. 3-113.)

In other areas of prenatal care, the Defendants offer parenting classes once a week, prenatal exercise classes two days a week for an hour (as of May 1994) and a "therapeutic community" (as of April 1994) in which counselors and Ms. Linda Studevent, the unit manager for pregnant women, hold group discussions with women prisoners on issues related to pregnancy. (R. 9-121 to 23, R. 4-11 to 4-13.)

Defendants, however, provide post-partum women prisoners with almost no time to visit their babies while the babies board at D.C. General. (R. 4-18; 6-100.) The record shows that mothers are transported to D.C General for visits only when the baby is critically ill. (R. 9-141 to 42; Pls. Ex. 48 at 6, 7, 9, 11, 13.) The Defendants have no policy statement on visitation between inmates and their babies. The evidence indicates that women need to hold their children at each feeding time. (R. 3-121 to 122.)

In cases where the infant is critically ill, the infant has died or when the mother is depressed because of child placement, post-partum counseling is crucial in alleviating stress or depression. (R. 3-128 to 129.) Defendants offer post-partum counseling through Ms. Loretta Brantley, a supervisory social worker. (R. 10A-4 to 5 (Morning Ses-

sion).) Ms. Brantley has worked on the pregnancy unit since May 1994 and supervised the previous pregnancy counselor Ms. Pearl Jackson. (R. 10A-6 (Morning Session).)

Perhaps the most important post-partum concern is child placement while a mother is incarcerated. The Defendants recognize that the separation of women prisoners from their children often creates a trauma more severe than that experienced by male prisoners. (R. 8-115, 9-10, 11-51.) The Defendants' policy on child placement is as follows: "Arrangements for placement of any child born while the mother is in custody should begin as soon as the pregnancy is known, but prior to delivery." (Pls. Ex. 8 at DC0000090.) The evidence shows that child placement counseling needs to occur by at least the second trimester. (R. 3-116.) At trial, the Defendants claimed that as of January 1994 child placement counseling is available for pregnant women prisoners once a week. (R. 9-125, 127; R. 10A-4 (Morning Session).)

By 1994, however, Defendants recognized that they did not offer enough programming in the area of boarder babies, child custody and foster care. (Pls. Ex. 434 at DC0027809.) Jane Doe L testified that at no point during her pregnancy did anyone at CTF counsel her on child placement. (R. 2-151.) Jane Doe QQQ tried to make arrangements for the placement of her child but the counselor responsible for child placement "seemed unconcerned and unwilling to assist [her]." (R. 4-32.) Jane Doe QQQ testified that a woman she briefly met once will care for the baby. (R. 4-32.)

Plaintiffs' Exhibit 458 lists seven inmates' babies who boarded at D.C. General in 1993. The previous year, 16 babies of women prisoners boarded at the hospital. (R. 10A-33 (Morning Session).) Dr. Major stated that in his experience with correctional institutions he had never seen that many boarder babies. (R. 3-119 to 120.) He "refused to

believe that this many mothers did not want their children placed properly." (R. 3-120.) Dr. Charles Hall has not spoken to anyone within the DCDC about the issue of boarder babies. (R. 14-10.)

Overall, many of the problems with obstetrical and gynecological care can be traced to inadequate staffing, problems with transportation and a lack of consultation between CTF and D.C. General. As of November 1993, Dr. Eliza Taylor stated that the physician shortage is "quite apparent." (Pls. Ex. 394 at DC0025016.) Even when staff is available, the Defendants too often fail to transport women prisoners to medical appointments. (Pls. Ex. 389 at DC0024258-63; Ali Dep. at 103-04.) A lack of transportation caused Jane Doe QQQ to miss two prenatal appointments (R. 4-20.), kept Jane Doe K from approximately four appointments (R. 6-96.) and prevented Jane Doe II from being examined on two occasions. (R. 2-166 to 167.)

The Defendants' Monthly Medical Reports offer further proof that the lack of transportation is a longstanding problem. (Pls. Ex. 394.) In September 1992, 151 women were scheduled for OB/GYN appointments, 91 are listed as not receiving transportation and 9 refused to go. (Pls. Ex. 394 at DC0025220.) The Chief Medical Officer of CTF at that time, Dr. Lynette E. Mundey, expressed concern about the "significant number of no shows" and stated that the escort system had "not worked effectively." (Pls. Ex. 394 at DC0025218.) In November 1992, 148 women were scheduled for OB GYN appointments and 39 were listed under "no transportation." (Pls. Ex. 394 at DC0025201.) In October 1993, 100 women were scheduled for OB GYN appointments but only 76 were seen and in August 1993, 118 women prisoners had OB GYN appointments and 71 were seen. (Pls. Ex. 394 at DC0025033 & DC0025062.) Defendants' records fail to explain the reasons for these women not being examined.

Defendants hoped to improve the provision of medical care by creating a Memorandum of Understanding between D.C. General Hospital and the DCDC. (Pls. Ex. 455.) It requires administrative and clinical principals of each facility to attend meetings at intervals of no more than four months. (Pls. Ex. 455 at DC0030944.) The Memorandum also provides for continuity of care and states that all inmate-patients "referred to [D. C. General] for ambulatory clinics will be seen with dispatch and given priority status to other patients." (Pls. Ex. 455 at DC0030946.) Defendants do not follow this Memorandum of Understanding. (R. 3-138, 14-158.) Dr. John Clark, Defendants' medical expert, found that there was a "lack of adequate communication and coordination at three levels . . . . Medical to Medical (i.e., Doctor to Doctor), Nurse to Nurse (DCGH to CTF) and DCGH Medical to DOC-CTF Custody Staff." (Pls. Ex. 667 at 12.) Dr. Charles Hall of CTF has had no discussions with D.C. General concerning the general quality of care that is provided to all women prisoners who are treated at D.C. General. (Charles Hall Dep. at 151.)

C. Physical Conditions of Confinement at CTF and the Annex

1. *Housing Conditions*

a. CTF

The DCDC created CTF in response to a need for an 800-bed facility that would offer intensive treatment and transitional services for special needs offenders. (Pls. Ex. 338 at DC0018947.) The Defendants intended to divide the facility into three areas: Reception and Diagnostic (288 beds); Substance Abuse (256 beds), and Mental Health (256 beds). (Pls. Ex. 338 at DC0018947.) This plan changed in 1992 when the Defendants increased the number of female offenders

to be placed at CTF and delayed the implementation of the Mental Health Program. (Pls. Ex. 338 at DC0018947-48.) This decision was made for primarily financial reasons. (R. 8-9.) In a February 27, 1992 letter to Deputy Mayor Robert Mallett, Mr. Ridley explained his request to change the mission of CTF:

> Unfortunately, recent developments associated with the budget and the growing population has forced the department to reconsider full implementation of the Mental Health Program at the CTF. The Federal Bureau of Prisons informed the department that it can no longer house approximately 700 inmates from the District. The anticipated increase in population by 700-800, as a result of the Bail Reform Act, and assurance that existing court orders are complied with are a few of the problems forcing the department to consider increasing the number of females at the CTF. *More importantly, the department must consider all cost saving efforts as a means of meeting its budget mark.*

(Pls. Ex. 338 at DC0018948) (emphasis added). In assessing the "Pros" and "Cons" of this move, the first "Pro" listed was: "Assist the department in reducing its budget by eliminating 71 positions with a savings of $ 3,267,748." (Pls. Ex. 338 at DC0018949.) One of the "Cons" was "[a] small number of individuals in the community may respond in a negative manner concerning the movement of women from a campus-like setting to a closed-in setting. This can be justified in that the availability of more comprehensive services and privacy outweigh the continued placement at Lorton." (Pls. Ex. at 338 at DC0018950.)

CTF is constructed as a series of multi-level buildings all connected by inside walkways. (Pls. Ex. 638 at 5.) Administration, medical and visiting facilities are located in Building

B; food service is located in the basements of Buildings A and B; central services and a gymnasium are located in Building B; reception and diagnostic services are located in Building C (which houses some females); housing and treatment facilities for substance abuse are located in Building D. (Pls. Ex. 638 at 5.)

Women prisoners are housed in Building E. (Pls. Ex. 638 at 5.) Building E contains 4 housing units and there are 64 cells in each housing unit. A single unit takes up an entire floor and is symmetrically divided into an "A" side and a "B" side. Each side has a day room and then an L shape to the building of two wings of cells opening off the day room and each of the legs of the L has two levels of cells in it. There are eight cells on each level.

Each cell has a single bed with a toilet, a slot type window on an outside wall and registers for air circulation. (R. 6-53.) The bed is fastened to a masonry outside wall. (R. 6-53.) The cells are not insulated and those at the far end have two outside walls which make them the coldest rooms. (R. 6-53.)

As Mr. Paul Quander, the Executive Deputy Director for the DCDC said of the facility, "CTF is designed for controlled movement . . . . Elevator control, door control, electronics, computer generated. Things of that nature. It's different from what we have in our other facilities." (R. 8-67.) Ms. Lancaster added, "This is not the type of facility that would be designed for a general population female institution and is not designed in my opinion to house a general prison population . . . ." (R. 5-45.)

Despite the fact that it is a new facility, CTF has problems. The facility is unable to generate a sufficient amount of heat in winter. (Pls. Ex. 145 at DC0003388; Pls. Ex. 159 at

DC0003820.) The failure of steam coils in the air handling mechanism and lack of insulation in the cells cause low cell temperatures. (Pls. Ex. 638 at 7-8; R. 6-55 to 56, 72.) The steam coil malfunction forced the administration to shut down the outdoor air intake and thus prevent the entry of fresh air and the removal of contaminants. (Pls. Ex. 638 at 7; R. 6-56.) Jane Doe V testified:

> Last winter, my first winter in CTF, I experienced icicles on [the inside of] my windows, extremely cold weather, blowing puffs out of my mouth and nostrils. There were mornings when we would have to get extra blankets if they would bring them up to us. We would have to put on layers and layers of clothes just to stay warm.[17/]

(R. 4-89.) Low temperatures greatly increase the incidence of illness from cold or flu. (R. 6-54; Pls. Ex. 159 at DC0003820.)

Jane Doe K notified the Defendants about the heating problem in a letter to Ms. Parrott-Fonseca asking for the Administration to fix the problem. (Pls. Ex. 160 at DC0003826-27.) She wrote:

> I come to you expressing the dire need for heat in the Correctional Treatment Facility . . . . The institution has provided some of the residents with extra clothing and blankets, but even so, there is a large percentage of the

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17/ Jane Doe II also stated that during the winter months there was ice on the inside of her windows, as well. She, however, claimed that nobody gave her extra clothing or blankets. She stayed warm by wearing "two and three jumpsuits, and robes and pajamas all at the same time." (R. 3-18.)

> population who did not receive such.[18] This act of kindness is still not enough to protect us from such frigid temperatures . . . . In this facility, the Department of Corrections houses residents of all [kinds]. There are pregnant females, diabetics, HIV patients, high and low blood pressure patients, etc. Therefore, these people, as well as those who are not categorized above, need to protect themselves from the cold. Some nights it gets so cold until I can't sleep . . . . I have heard many different stories regarding the heat situation . . . but the main thing is that we need heat in this building.

(Pls. Ex. 160 at DC0003826-27.) Jane Doe K received no response from the DCDC. (R. 6-119.)

Mr. Ward Duel, the Plaintiffs' expert in the field of environmental health, visited CTF in February 1994 on a mild February day and took temperature readings in the living areas. (R. 6-54.) Within the same unit some cells were 64 degrees and other cells were 75 degrees. (Pls. Ex. 638 at 7.) Mr. Duel found that the temperature of the air blowing out of a register was 65 degrees. (Pls. Ex. 638 at 8.) Residents use paper products, such as toilet paper and sanitary napkins, to cover air vents which are blowing cold air. (Pls. Ex. 147 DC0003401, DC0003412, DC0003444, DC0003440.)

The malfunction of the ventilating system creates noise. (Pls. Ex. 638 at 9-10.) From the ventilation noise alone, Mr. Duel received a decibel reading of 74 decibels and in an empty cell during the morning with the door shut he got a reading of 44 decibels. (Pls. Ex. 638 at 9.) He stated that

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[18] The evidence indicates that many women do not receive an adequate amount of blankets or clothing when the heating unit malfunctions. (R. 3-18, 4-89, 6-117 to 119.)

the maximum allowable decibel level for nighttime conditions is 45. (R. 6-57.)

Mr. David White, Chief of Facilities Maintenance at CTF, is uncertain that the recent efforts to repair the system will solve the problems with heat at CTF. (R. 6-68; 12-75.)

Beyond the heating problem, there are many other unsanitary conditions at CTF. There are defective toilets which result in the exposure of sewage and possible environmental transmission of sewage-born illnesses. (Pls. Ex. 638 at 6.) Water leaks out of some showers damaging ceilings below and injuring prisoners. (R. 6-62; Pls. Ex. 638 at 6-7; Pls. Ex. 159 at DC0003820.) CTF staff do not use cart liners to transport the laundry thus promoting the spread of germs. (Pls. Ex. 638 at 12; R. 6-58; 12-5.) Women inmates are responsible for cleaning their cells, yet the institution does not provide them with adequate supplies because of an internal distribution problem and an uneven delivery by the supplier. (R. 4-91; 6-62 to 63.) CTF has a problem with rodents. In a September 20, 1993 letter to Captain L.C. Jones, then Assistant Administrator for Operations, Ms. G. H. Washington, Associate Director of Programs, stated that "there is excessive mice dropping, mice nesting debris and trash on the floor, on the shelves, and behind the shelves." (Pls. Ex. 146 at DC0003390.) Mr. Duel found that CTF had a significant problem with mice in the corridors, hallways, stairways and kitchen. (Pls. Ex. 638 at 15.)

Inadequate food preparation threatens residents at CTF. (R. 6-63 to 65.) Mr. Duel found special diet meals[19/] which

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[19/] These meals are prepared for people with certain medical needs and for people who wish to comply with certain religious obligations. (R. 6-63 to 64.)

were 30 to 40 degrees below an acceptable level. (R. 6-64.) The sanitarian's Food Establishment Self-Evaluation Reports, (Pls. Ex. 183), are similar to the evaluations used by the D.C. Department of Consumer and Regulatory Affairs (DCRA) when they examine commercial food establishments. Out of 41 Food Establishment Self-Evaluation Reports for the CTF main and satellite kitchens, 34 fell below the "acceptable" level. (Pls. Ex. 183.) The Defendants recently hired a nutritionist who has improved the quality of the special diets but it is not clear whether she has been hired for long-term employment. (R. 6-71, 75.)

The water temperature in the lavatory hot water faucets ranged from the high 80's to the low 90's. (Pls. Ex. 638 at 6.) When the Administration uses disposable utensils, trays and plates during breakfast, the mid-morning water is borderline acceptable. (R. 6-69.) The use of disposable goods, however, creates a waste removal burden. (R. 12-8.)

b. The Annex

Though the Defendants intended to send all female prisoners to CTF in 1992, "population pressures" forced the Defendants to use the Annex to house short-term female prisoners. (Pls. Ex. 334 at DC0018932.) One factor in this decision is contained in a June 1, 1992 Memorandum to Director Ridley, in which Administrator Krull observes that by "confining the population to short-term offenders, the risk of a law suit is diminished." (Pls. Ex. 334 at DC0018935.) Despite this type of strategic thinking, the Defendants' official policy states: "It is the policy of the DCDC to provide a safe environment for all staff and inmates in its institutions and facilities through compliance with American Correctional Association (ACA) standards and other applicable regulations and statutes." (Pls. Ex. 143.)

The Annex was constructed in 1955 and served as the Department's Training Academy until August 1988 when it was converted to a minimum security facility for male prisoners. In September 1989, it was converted again for use by women prisoners. The Annex is composed of dormitories which are converted military barracks. (Pls. Ex. 637 at 4.) Dormitory 6 is a large open room with a rest room and small day room combination opening off one end. (Pls. Ex. 637 at 4; R. 6-10.) Dormitory 7 is a larger dormitory with smaller sleeping areas on either side that open up into a small, central day room. (Pls. Ex. 637 at 4; R. 6-10.) Attached to the day room is a rest room and showers shared by both wings. (Pls. Ex. 637 at 4.) In Dormitory 6, as of June 1994, there were 80 beds. (R. 6-8, 6-43.) In Dormitory 7A there were 62 beds and in Dormitory 7B there were 32 beds. (R. 6-8, 6-43.) The beds in the dormitories are double bunks the heads of which are placed against the outside wall. (R. 6-8.) Most of the beds in the row are approximately 30 inches apart which means that an inadequate amount of light reaches the lower bunks.[20/] (R. 6-8; 11-142; Pls. Ex. 637 at 14.) The lack of light is an obstacle to floor cleaning. (Pls. Ex. 637 at 14; R. 6-19 to 20.)

On July 26, 1993, Ms. Regina Gilmore,[21/] Acting Chief of Female Offender Programs, sent a letter to Ms. G.H. Washington. In the letter, Ms. Gilmore provided a summary of conditions at the Annex:

[20/] The light on the lower bunks ranges from less than five-foot candles to ten-foot candles. (Pls. Ex. 637 at 14.) The American Public Health standard is 30-foot candles and the ACA standard is 20-foot candles. (Pls. Ex. 637 at 14.)

[21/] Ms. Gilmore is presently the Coordinator of the Female Offenders Program for the DCDC.

> These buildings were not initially designed for continued residency and in 1989 emergency renovations were made to accommodate housing of female residents. In July 1992, the population dramatically decreased when CTF opened and upkeep suffered. In late 1992, the population quickly swelled as female offenders were returned from federal facilities and the Detention Facility transferred more women to manage crowding. There is an average of one hundred and seventy (170) females housed in these two dorms. Renovations and preventive maintenance have not kept pace and repair needs have reached crisis proportions.

(Pls. Ex. 170 at DC0003870.)

The environmental health experts o the Plaintiffs and the Defendants believe that the population in the dormitories is "excessive."[22/] (R. 6-10, 11-140.) The overcrowding at the Annex creates a shortage of sanitary facilities,[23/] (Pls. Ex. 637 at 9-10.), increases the spread of infectious disease, (R. 6-11.), produces a heightened noise level,[24/] (Pls. Ex. 637 at 8.) and creates filthy living conditions, such as dirty floors

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[22/] Defendants' environmental health expert, Mr. Peter Genco, believes that the Annex population must be reduced by 50 percent. (R. 11-140.)

[23/] The ACA standard requires 1 lavatory for every 12 inmates and a shower for every 8 inmates. (Pls. Ex. 637 at 9.) In February 1994, Dormitory 6 had a ratio of 13 inmates per toilet, 12 inmates per sink and 12 inmates per shower. (R. 6-15.) In Dormitory 7 there was a ratio of 16 inmates per toilet, 19 inmates per sink and 16 inmates per shower. (R. 6-15.)

[24/] The noise in the day room of Dormitory 7 registered at 74 decibels. (Pls. Ex. 637 at 8.) The ACA standard of acceptability for daytime noise is below 70. (R. 6-17.)

and moldy bathrooms. (R. 4-119; 4-150.) Jane Doe XI stated, "I was housed . . . for a long period of time [at] Alderson, West Virginia [which] is the oldest federal women's facility there is and . . . you can't even compare it to [the Annex] . . . . (R. 4-150.)

There is no mechanical ventilation in the dormitories except for the window air conditioners. (Pls. Ex. 637 at 12-13.) This results in a level of carbon dioxide which far exceeds military standards. (R. 6-11 to 6-15.) The poor quality of air promotes eye and throat irritation and the transmission of respiratory illnesses. (R. 6-15.)

The Annex also has a "very significant level of roaches." (Pls. Ex. 637 at 11-12; R. 6-22.) As Jane Doe VII testified: "They're in the room, in your bunk . . . . If you look behind your bunk right in the crease, . . . you'll see roaches hibernating back there. . . . Sometimes if you look over next to you you'll see roaches crawling on the person while they sleep." (R. 4-120.) Plaintiffs' environmental health expert witnessed roaches in footlockers and vertical lockers at the Annex. (R. 6-22 to 6-23.) Roaches use the many cracks in Annex walls to hide or drop an egg and are capable of carrying dysentery, salmonella and infectious hepatitis. (R. 6-22 to 6-24.)

Mr. Duel found torn mattresses and pillows which provide a haven for bedbugs, lice and ectoparasites. (Pls. Ex. 637; R. 10-11; R. 6-24 to 6-25.) Torn mattresses cannot be cleaned effectively, thereby increasing the likelihood that previous users will transmit skin diseases to the next person who sleeps on the mattress. (R. 6-25.) Defendants also place clean and dirty laundry in the same cart without any liner. (Pls. Ex. 637 at 16; R. 6-49 to 6-50, 11-139.) Germs from the dirty laundry stay in the cart to contaminate the clean laundry that reenters the cart. (R. 6-49 to 50.)

The kitchen facilities are unsanitary. (Pls. Ex. 637 at 18-20.) Despite Defendants' efforts to clean prior to inspection, Mr. Duel found dirt in less obvious places. (R. 6-32.) A review of maintenance records revealed that the kitchen drains were frequently clogged. (R. 6-33.) All of the these unsanitary conditions in the kitchen provide a source of food borne illnesses. (R. 6-33.) In addition, the dumpsters attract vermin because they are left open and contain unbagged material from the cafeteria. (R. 6-28 to 29, 11-142.)

Monthly inspection reports performed by the Defendants' Environmental Safety and Sanitation Office indicate that there is very little preventive maintenance at the Annex. (Pls. Ex. 144.) The heating unit which is designed to provide heat and hot water to the Annex frequently malfunctions, resulting in lukewarm water all year around. (R. 4-120; 6-26; Pls. Ex. 170 DC0003871.) The grounds of the Annex drain poorly which results in dangerous accumulations of ice in the winter, mud in the day rooms and breeding grounds for mosquitos in summer. (R. 6-27 to 6-28; Pls. Ex. 486; Smith Dep. at 87-88; Gilmore Dep. at 108, 127.) In fact, mosquitos and flies are in the dining room, the food preparation area and the dish washing area of the kitchen. (R. 6-46, 11-144.) These mosquitos transmit illness-causing organisms. (R. 6-46.)

The record indicates a willingness on the part of women prisoners to improve the living conditions at the Annex. In a letter to Ms. G.H. Washington, dated June 26, 1993 Jane Doe XI stated:

> In all of these years of doing my sentence I have never seen such run-down nor deplorable conditions for living quarters . . . . I do not believe that you are truly aware of this . . . . There are much needed repairs that need to be done here. Also the up-keep is not truly being maintained for the Women's Dorms. Alot of us Federal

> Women are applicable and trained in all areas. We can paint, do carpentry and other jobs. Several of us have offered to do the painting of the Dorm I'm living in, if only the paint and materials would be purchased. Repeatedly nothing is done.

(Pls. Ex 177.)

Outside of the Annex grounds, in the area of prison industries, women prisoners have a history of enduring unhealthy working environment. The Defendants have given potentially hazardous food to women who must eat in unsanitary conditions. (Pls. Ex. 637 at 18; R. 6-35.) The Defendants now provide women with thermal trays, a special delivery truck which keeps the food warmer, and two microwave ovens in the garment shop. (R. 6-46 to 6-47, 11-145-46, Gibbons Dep. at 117.)

Though approximately 25 women used to share one small bathroom at the garment shop, the Defendants now provide the male prisoners with a single bathroom and give the women prisoners four bathrooms. (R. 4-140 to 141; 11-136; Pls. Ex. 362.)

The printing and garment shops do not have an adequate ventilation system which is capable of diluting and eliminating airborne contaminants. (R. 6-34; Pls. Ex. 637 at 13.) Instead there are fans near the ceiling on one side which blow air into the building while on the other side there are fans to blow air out of the building. (R. 6-33 to 6-34.)

Though the evidence undoubtedly demonstrates some attempts to improve conditions at the Annex and the industries, numerous Daily Work Sheets of Facilities Management and Facilities Engineering Service Orders show accelerated activity in the month before the site visit of the Plaintiffs'

environmental health expert, Mr. Duel. (Pls. Ex. 480 DC0033257-DC0033300.) Since the February 1994 inspection by Mr. Duel, the Defendants have repaired the roof where it leaked onto the electrical box. (R. 6-44.) A dirty ceiling in the kitchen had been replaced and lighting for the walk-in coolers had been added. (R. 6-45.)

2. *Fire Safety*

The three crucial elements of fire safety are the building, the systems within the building, and the building's operations. (R. 7-7.) The operational aspect of a correctional facility is distinct from an ordinary building because inmates need the assistance of third parties (correctional staff) to exit a building. (R. 7-23.) It is, therefore, crucially important to educate and drill staff in the removal of people from the building in an emergency.

a. CTF

The buildings of CTF are made of non-combustible materials, with fairly low combustible loading inside. (R. 7-39.) The facility has a full sprinkler system and a full fire alarm system. (R. 7-39.) It has a detection system in the corridors and common areas. (R. 7-39 to 7-40.) Though the fire alarm system is tested quarterly, (R. 13-23.), the sprinkler system is not being adequately maintained and tested. (R. 7-40 to 41; 13-24 and 63.) The sprinkler system, however, should be tested quarterly. (R. 13-63.) There is maintenance of the fire pump[25/] but no testing. (R. 7-41.) All nationally recognized standards require annual testing of a fire pump. (R. 7-41.)

[25/] The fire pump provides the thrust that the water needs to reach the sprinkler units at the upper levels of the building. (R. 7-41.)

There is water leakage occurring in the building, especially in the basement and the culinary area where electrical conduit and electrical equipment are exposed. (R. 7-39.) The staff stores more in culinary spaces than the sprinkler system can handle. (R. 7-44 to 7-45.)

In the area of fire drills, approximately ten staff members and four inmates told Mr. Thomas W. Jaeger, the Plaintiffs' expert in the field of fire safety, that a year will pass without a fire drill. (R. 7-44.) Dr. Eliza J. Taylor, Acting Chief Medical Officer at CTF, informed Dr. William Hall on July 30, 1993: "Have requested a fire drill for levels 68 and 82. Staff really needs to go [through] a mock evacuation drill." (Pls. Ex. 394 at DC0025075.) On September 1, 1993, she wrote that "Sgt. Bonapart, Safety and Fire, had been approached on several occasions regarding mock evacuation drill--especially egress from . . . [the] Infirmary. There has to be a concerted effort on the part of the medical staff and security to coordinate the evacuation procedure because of the difficulty with movement in this facility." (Pls. Ex. 394 at DC0025059.)

b. The Annex

The level of fire safety at the Lorton Annex is grossly inadequate and below any nationally recognized standard. (R. 7-5.) It is not even in compliance with the District of Columbia standards. (R. 7-27.) The two Annex dormitories are of ordinary construction, which means that the Annex has masonry floors, masonry walls and wood roofs, wood paneling and planking as interior finish within the building. (R. 7-7 to 7-8.)

The combustible load at the Annex is heavy because 174 people with personal items, such as beds and pillows, live in a relatively small area. (R. 7-8.) Some inmates have lockers,

but there are a significant amount of personal items stored in cardboard boxes and plastic bags near bunks which contributes to a hazardous continuity of the combustible load.[26] (R. 7-9; Pls. Ex. 398.) The use of metal storage lockers would significantly decrease the continuity of the load. (R. 7-9.)

Each dormitory possesses a storage room with a high load and one dormitory has a storage locker. (R. 7-9.) Inside this area are cleaning materials, a large supply of paper towels, toilet paper and a large amount of combustible material. (R. 7-9.)

A fire would spread from one end of a dormitory to the other end in approximately five minutes. (R. 7-10.) There is also the danger of "flashover," which means that all the combustibles could be heated to the point of ignition when exposed to enough oxygen. (R. 7-11.)

The only compartmentalization[27] at the Annex is the separation of the boiler room from the dormitory. (R. 7-11 to 7-12.) Nothing exists to contain a fire within the T.V. room, the sleeping area, the bathroom, the storage area or offices. (R. 7-12.)

The two dormitories have several exits for use in an emergency. (R. 7-12 to 7-14.) Dormitory 6 has three exits which include the main door and doors at the far end and by the T.V. room. (R. 12-127.) Dormitory 7 has three exits in addition to its main door. (R. 12-128.) The main doors are

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[26] This measurement reflects the ability of a fire to spread from one piece of combustible material to another. (R. 7-8.)

[27] Compartmentalization is a construction design which places fire-rated doors or smoke-tight doors around an area so that a fire remains contained in that space. (R. 7-11.)

unlocked 24 hours a day and the other doors are locked between 11:00 p.m. and 7:00 a.m.[28/] (R. 12-127.) Although the Annex has windows, there is not a nationally recognized standard that recognizes a window as an exit except in a single-family home. (R. 7-14.)

The amount of exits and their capacity are adequate for the number of people living in the Annex, but Mr. Jaeger testified that there must always be exits in two directions because a fire could block access to a single exit. (R. 7-13; 7-21.)

The fact that the dormitories are single-story structures does not eliminate the danger to residents. (R. 7-29 to 30.) Multiple death fires still occur in single-story buildings. (R. 7-30 to 7-31.) In 1982, 29 people died in a fire that occurred in a one-story, fire-resistant building in Biloxi, Mississippi. (R. 7-31.)

At this time, the Defendants do not have an adequate fire alarm system at the Annex. The fire alarm apparatus at the Annex is antiquated. (R. 7-15.) The dormitories have a pull station and a bell to notify residents in the event of a fire. (R. 7-15.) There is no control panel, no system supervision and no distribution of bells throughout the building. (R. 7-15.) The bell rings only within the dormitory itself. (R. 7-15.) The sleeping areas of the dormitories have smoke detectors which alert only those within the area of the detector. (R. 7-16.) There is no control panel to provide emergency power or to send a signal outside the buildings to a central control center or to send a warning that the system is not operational.

[28/] When Plaintiffs' fire safety expert, Mr. Jaeger, performed his tour of the Annex, he was told that the exits are locked. (R. 7-13.) Since that time he has been told that one exit in the center of each building remains unlocked while the exits at each end are locked. (R. 7-13.)

(R. 7-16.)

The only "realistic" fire suppression system to use at the Annex would be a sprinkler system. (R. 7-18 to 7-19.) The dormitories only have 2½ gallon fire extinguishers. (R. 7-19.) These cannot serve as a large component of fire suppression since they are only designed for small fires and people usually do not know how to operate them. (R. 7-19.)

The Defendants' policy at Minimum for fire protection outlines a plan for fire prevention, fire suppression, and evacuation. (Pls. Ex. 400.) It requires "fire inspections and testing of equipment by [a] Fire Safety Officer at least once each quarter . . . and an annual inspection by [the] Fire Prevention Section, Lorton Volunteer Fire Department or other qualified Fire Inspector(s) . . . ." (Pls. Ex. 400 at 1.) Though the plan calls for quarterly drills, there is no evidence of staff training or the actual occurrence or success of drills. (R. 7-22.) The plan also does not state whether "quarterly" intervals refers to four times per year per shift, or four times per year per site, or four times per year per building. (R. 7-23.) The national standard calls for four drills per shift per year so that every shift is prepared. (R. 7-23.) Some of the Annex staff told Mr. Jaeger that they had not performed any drills, while others recalled that their last drill happened four or five months earlier. (R. 7-25.)

On the issue of planning, Mr. Jaeger's testified: "I asked the correctional officer in Dorm 6 for their fire evacuation plan for the dormitory, and what I was handed was post orders, and the post orders don't refer one word to fire safety. There's a separate fire evacuation plan. That correctional officer did not understand the difference between their post orders and their fire evacuation plans." (R. 7-25 to 7-26.)

The Defendants have known about the hazardous condi-

tions at the Annex for a long time. On January 24, 1994, Corporal Pleasant of Minimum informed Ms. Barbara A. Hart, the Acting Assistant Administrator for Operations, about certain deficiencies at the facility relating to fire safety. (Pls. Ex. 403.) He concluded his letter by stating: "Based upon my direct observation, the severity of the deficiencies in most instances would indicate they should be made top priority, but, they're merely ignored." (Pls. Ex. 403 at DC0025594.)

Pursuant to a request by Mr. Douglas W. Stempson, the Administrator at Minimum, Systems Engineering, Inc.[29/] conducted an inspection of Minimum and concluded that it "constitute[s] an immediate life threatening situation. The problem has been exacerbated by the over-crowding condition of the Minimum Security Facility. There are hundreds of inmates and staff at the Minimum Security Facility, and there is no means of fire detection or evacuation."[30/] (Pls. Ex. 532 at DC0035801.) The report also rated the fire alarm system in the Administration Building, the gymnasium and the cafeteria as "very poor" because the fire alarm panels are not operational, the voice evacuation systems have been removed, the smoke detectors are filthy or painted, and the manual stations are broken or inoperable. (Pls. Ex. 532 at DC0035801.) All of this is the result of Defendants' neglect and improper operation. (Pls. Ex. 525 at DC0035587.) Mr. Stempson and Ronald Jenkins, the D.C.D.C. Fire Marshal selected the proposal of Systems Engineering, Inc. to install a new fire alarm system. (Pls. Ex. 525 at DC0035587.)

On April 8, 1994, Mr. Stempson requested funding for a

[29/] This company specializes in fire alarm system design, development, testing, maintenance and repair.

[30/] Mr. Jaeger agreed that there are no provisions for fire detection but there are provisions for evacuation.

fire alarm system and stated, "The lack of a working, compliant fire alarm system creates hazardous living and working conditions at the institution . . . The investment in a new fire alarm system is likely to be much less than the liability resulting from a lawsuit." (Pls. Ex. 525 at DC0035586.)

Mr. Quander, the Executive Deputy Director for the DCDC, responded to Mr. Stempson by speaking with the associate directors and requesting another survey to see if in fact the SEI report was accurate and to determine if funds were available to correct the problem if it existed. (R. 8-47.) Mr. Quander, however, testified that he had no knowledge as to who is responsible for the survey and when it will be complete. (R. 8-58.)

D. Programs

The term "programs" encompasses: 1) educational programs which include academic, college and vocational, 2) work programs which would include work details, industries and work training, 3) recreational programs and 4) religious programs. (R. 5-6.)

The issue of programs must be viewed with an eye toward the general characteristics of an inmate population. In 1992, the demography of women prisoners in D.C. was as follows: 97 percent were African-American; 82 percent were single-parent primary caretakers; 85 percent were unemployed; 42 percent had a twelfth-grade education, and 7 percent were serving sentences for a violent crime. (Pls. Ex. 289 at DC0018269.)

Though women prisoners have access to programming within the D.C. correctional system, women prisoners many times do not receive reception and diagnostic (R&D) studies to determine their programming needs and interests. (Pls. Ex.

281 at DC0018045-46.) This is not the case with male prisoners. (Gibbons Dep. at 62-63.)

A report from the Female Offender Programs Office detailed the Defendant's overall failure to provide adequate programming for women prisoners. The report points to several reasons for the failure but concluded: "Of paramount influence is the Department's sudden housing of 99.5 percent of all female D.C. Code offenders without having planned, developed and implemented either programs or resources to meet the long-term treatment needs of this unique population." (Pls. Ex. 281 at DC0018044.) Mr. Plaut and Mr. Quander concede that when the women returned to CTF from the federal system not all programs were in place. (R. 8-19, 8-106.)

In addition to obvious intellectual and financial benefits, the completion of academic, vocational, apprenticeship and higher education programs qualifies women prisoners for good time credits (Pls. Ex. 272 at DC0017648-57.) and an increased industrial wage. (R. 10A-48 (Morning Session).)

On the subject of work opportunities, Ms. Jennie Lancaster, the Plaintiffs' expert penologist, testified:

> One of the questions that I also asked during my interviews was what, in the employees' opinion . . . caused women to come back to prison in the District . . . . And what I heard over and over is lack of money to take care of themselves, to take care of their children, inability to have a job. . . .

(R. 5-41.)

1. *The Annex*

The Court will analyze the quality of programs offered to women prisoners by comparing the minimum custody women at the Annex to similarly situated males at the Minimum Facility (Minimum). The population at Minimum as of January 1994 was 1,103 prisoners; 167 of whom were women.[31/] (Pls. Ex. 520 at DC0030884 & DC0030902.)

a. Academic and College Education

Whereas the men at Minimum receive full time Adult Basic Education (ABE) and General Education Development (GED) classes (R. 5-19.), the women at the Annex have one teacher, Ms. Gray, who provides the residents a three-hour ABE class and a three-hour GED class. (R. 5-18.)

Sometimes the classes do not meet. The Defendants closed the school when the D.C. Government planned to move all women prisoners from Minimum to CTF. (R. 5-19.) In the summer of 1993, the air conditioning system in the classroom broke, forcing the closure of the school. (R. 4-103.) On another occasion, Ms. Gray broke her leg and missed approximately three months of work. (R. 4-102.) Though Ms. Hazel Smith, then Acting Correctional Program Officer,[32/] asked Mr. Stempson for a replacement, no substitute was sent. (Smith Dep. at 105.)

Dr. Ryan, the Defendants' expert penologist, described the basic education offered at the Annex as "minimally

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31/ Mr. Plaut testified that the current population is 174. (R. 8-99.)

32/ Ms. Smith is presently the Assistant Warden at the Annex.

adequate." (R. 11-65.) In her tour of the Annex she found women prisoners who would pursue this course of study if another teacher was available. (R. 11-66.) For this reason, Dr. Ryan recommends that the Annex hire a new teacher. (R. 11-66.)

The college education at Minimum and the Annex is two pre-college classes and two electives each semester which meet at the main compound. (R. 5-20.) The women rely on escorts who routinely take them to class late. (R. 4-100 to 4-101.)

b. Vocational Education

Vocational programming usually has two components: on-the-job training and a related classroom curriculum. (R. 5-22.) The Annex offers one vocational program to women. This is the Graphic Arts program which is held at Central and lasts 15 weeks. (R. 5-27 to 28.) It would, however, take a year in that program to gain real skills in order to get a job in that industry. (R. 5-28.)

The men at Minimum, as well as women, receive the Employment Training and Awareness Technique Program (ETAP). (Pls. Ex. 674 at 1.)

The limited sentences served by minimum custody prisoners present difficulties for a prisoner since an adequate vocational program usually lasts one to two years. (R. 11-70.)

c. Work Details

The Annex provides residents with work details which are support duties needed for the running of the jail. (R. 5-29) They include maintenance, housekeeping, receptionist, library

work, and office clerk. (R. 5-32; Pls. Ex. 379.) They do not perform the more skilled maintenance duties (e.g., carpentry, plumbing.) at the Annex. (R. 5-33.)

The male inmates at Minimum have over 30 separate work details. Some of the details are carpentry, dairy, mechanics, painting, plumbing and welding. (R. 5-32 to 33; Pls. Ex. 379.) Some men leave the facility to work on a farm. (R. 5-33.) With the exception of Greensweep and a position at a halfway house, women are confined to the Annex. (R. 5-33.)

d. Industries

A prison industry is a business run out of a prison where goods are produced with inmate labor and then sold to government agencies. (R. 10A-46 (Morning Session).) Prison industries usually offer the highest wage and the most valuable job skills. (R. 5-34.) The pay scale ranges from approximately $ 80 a month to $ 300 a month. (Pls. Ex. 225 at DC0008487.) Those working under staff supervision can make up to $ 1.99 an hour and unsupervised prisoners can earn up to $ 2.63 an hour. (R. 10A-48 (Morning Session).)

Presently 65 out of the 604 prisoners who participate in industries are women. (R. 10A-48 to 9 (Morning Session).) Women at the Annex participate in the garment shop (50 women) and print shop (2 women) at Central. Men at Minimum may participate in the industries of agriculture and landscape. (Pls. Ex. 674 at 2.) Dr. Wilbert Brown Jr., Assistant Director for Industries, stated that women may not participate in any of the other industries at Central "primarily because of security availability. That is primarily a security accommodation kind of issue because we don't have adequate restrooms . . . ." (R. 10A-50 (Morning Session).) Mr. Brown also testified that the furniture repair shop, the metal fabrica-

tion shop and laundry facility do not provide room to adequately view the prisoners. (R. 10A-50 to 51 (Morning Session).) The agricultural program takes place over 460 acres and would be difficult to supervise. (R. 10A-51 to 52 (Morning Session).)

e. Work Training

Work training is a program which allows inmates to work in the community at regular wages. (R. 5-37.) Mr. William Plaut, the Deputy Director of Operations and the Acting Deputy Director of Programs stated, "the primary mission of the Minimum Security Facility is a work institution, . . . it's the institution in the Department whereby inmates, both male and female, can participate in work training programs . . . ." (R. 8-97.)

The policy at Minimum is that a woman prisoner must reside at the facility for 90 days and be one year short of release before she is eligible for work training. (R. 4-144, 5-38.) Then, the women undergo a psychological evaluation. (R. 5-38.) The next step is the four-week ETAP program which is pre-vocational. (R. 5-38 to 39.) Afterward, the case managers must complete paperwork which is usually accomplished in four to eight weeks. (R. 5-39.) Mr. Derr, the vocation development specialist, believes that there are eligible women who cannot participate simply because they do not have paperwork done. He said, "Normally, nine times out of ten the ones who come from CTF are almost eligible . . . . ." (Derr I Dep. at 116.)

The women's participation in work training is "token." (R. 5-37.) In 1992, 2 women participated and the following year 3 women took part. (R. 5-37.) Dr. Ryan found on her tour that 4 women participated in work training. (R. 11-71.) Jane Doe XI said that more women do not participate in work

training because, "You don't ever hear [or read] anything about work training at Minimum Women's Annex unless one of the ladies that had been on work training happens to discuss it with you." (R. 4-148.)

Jane Doe XI had difficulty with this program because Mr. Derr was so busy with other duties that he did not have the time to take women prisoners on job interviews. (R. 4-146 to 147.) Mr. Derr does not have sufficient transportation either. (R. 4-146; Derr I Dep. at 131.)

The average number of men is usually 55 to 60. (R. 5-37 to 5-38.) They work in construction, as truck drivers, and as day laborers. (R. 5-38.) The Administration explains the disparity by citing the varying sentence structures of the men and women. (R. 5-38.)

f. Recreation

The Annex has a recreation trailer which contains a pool table, a ping pong table, exercise bikes and a weight machine. (R. 5-46; Pls. Ex. 27 at DC0000314.) The trailer is scheduled to be open approximately two hours on Sunday, Tuesday and Thursday; three hours on Saturday, and four hours on Monday, Wednesday and Friday. (Pls. Ex. 27 at DC0000313.) The trailer is closed on Sunday, Tuesday and Thursday during visitation hours. (Pls. Ex. 27 at DC0000313.) A staff member, usually Recreation Specialist Hargrove, must open it. (R. 5-46.)

There are no outdoor recreation facilities at the Annex. (R. 5-46.) Ms. Hargrove, therefore, escorts the women as a group to the recreation areas at the Minimum Facility main compound twice a week for three hours. (R. 5-46.) They can participate in volleyball, basketball, handball, ROTC and talent shows. (Pls. Ex. 27 at DC0000314.) Sometimes

outside guests perform at events like Gospel shows, fashion shows, and variety shows. (Pls. Ex. 27 at DC0000314.) But Jane Doe VII said that "if the men are having a . . . basketball game or volley ball game then they take away our rec time so they can have their games." (R. 4-107.)

The men at Minimum have access to the gymnasium and the ball field for approximately 6 hours in the morning Monday through Friday, and approximately 3 hours on several nights each week, and to the weight trailer 7 days a week during their free time. (Pls. Ex. 498). They may participate in organized intramural team sports. (R. 5-47.) The men may also participate in the Renaissance Drama Class.[33/] (R. 4-108.) The women prisoners may not participate in Renaissance and have no equivalent drama program. (R. 4-111, 115; Pls. 626.)

g. Religious Programs

In the area of religious programs, Ms. Lancaster stated, "In my experience religious programming promptly draws the greatest number of female inmates than any other program that's routinely offered." (R. 5-51.) The women have Catholic and Protestant services on a weekly basis and a Bible Study Program. (R. 5-50.) A chaplain goes to Minimum three times a week, but the hours are not scheduled and he has no office there. (R. 5-50.) The Defendants have difficulty satisfying the demand for Islamic services because of an inability to acquire volunteers to conduct those services. (R. 9-98 to 99.)

[33/] Renaissance is a drama troupe that performs for children in churches, juvenile detention facilities and recreation centers. (Pls. Ex. 627.)

There is no chapel at the Annex (R. 4-118.) so women hold religious services in the visiting hall. (R. 4-117.) Jane Doe VII stated: "During church service if the visitors have to use the bathroom then they'll come . . through the service, and when it's time for the visitors to leave, the females have to get [strip searched]." (R. 4-118.)

The men at Minimum have two Protestant services, Catholic services, Muslim services and four volunteer programs. (R. 5-51 to 52.) A chapel is also located on the grounds and a chaplain is assigned to Minimum. (R. 5-52.)

2. *CTF*

The Court will analyze the quality of programs offered to women prisoners by comparing medium custody general population women at CTF to the similarly situated men who reside at Occoquan Facility (Occoquan), Central Facility (Central), and the Medium Facility (Medium). As of January 1994 the population in each of those facilities was: 1,373 prisoners at Central, 1,016 at Medium and 1,767 at Occoquan, (Pls. Ex. 520 at DC0030883-85), and 271 women prisoners at CTF (Pls. Ex. 520 at DC0030902.)

a. Academic and College Education

Academic programs are available to women at CTF. The women have ABE class and GED class for approximately 3 hours a day. (R. 5-11 to 12.) These classes are scheduled at the same time as the vocational classes which means that if a woman wants to take both she can take only 1½ hours of each. (R. 9-83 to 84.) The men at Central have an 8-hour ABE class and an 8-hour GED class. (Gibbons Dep. at 61.) At Medium and Occoquan, there are 5½ hour ABE classes and 5½ hour GED classes. (R. 5-12.)

CTF offers college education to women, as well. Presently, Atlantic Union College (AUC) offers a computer-based AA degree program in general studies at the facility for 2½ hours in the morning, 3 days a week. (R. 5-15 to 16.) Residents may apply for a Pell Grant to cover tuition. (R. 5-15.) The credits that they earn with Atlantic are transferable to the University of the District of Columbia. (R. 11-62.) The Defendants expert penologist, testified that the Defendants should offer women prisoners at CTF a four-year program through an accredited university that ensures transferable credits. (R. 11-64 to 11-65.)

Mr. Walter Woodard, the GED teacher, helps women complete their Pell Grant forms; he passes out new books and he tries to correct computer problems. (R. 3-4.) The residents help each other with the classwork and then send it via computer to their AUC teacher in Lancaster, Massachusetts. (R. 3-5.) Women, however, have problems getting class materials (R. 3-5.) and problems delivering their homework in a timely manner long distance. (R. 3-6.) Currently women prisoners can only receive this class three days a week because male prisoners at CTF use the law library two days a week. (R. 3-6.)

Central, Medium and Occoquan offer more extensive college education. Central offers a UDC program which furnishes a B.A. degree, an A.A. degree and precollege courses. (R. 5-16.) Medium offers the Park College program which is offered 6 hours a day and provides a B.A. degree, a B.S. degree and an A.A. degree. (R. 5-16.) Occoquan gives residents a UDC program which offers an A.A. degree, a B.A. degree and the Park College program which offers a B.A. degree and an A.A. degree. (R. 5-16.) The District of Columbia funds the UDC programs while residents must receive a Pell Grant for the Park College program. (R. 5-16.)

Though CTF runs a primarily decentralized unit management system, education programs are centralized. (R. 11-32.) Since CTF is a controlled-movement facility, it is critical that the elevator and the escort service function effectively. (R. 11-101 to 11-102.) Women are taken to elevators which carry them to another floor where a staff member escorts them to the class area. Due to problems with the escort system at CTF, women often arrive late to class. In the male facilities, the men are simply let out of the dormitories or living areas and allowed to go to class independently.[34/]

The need for more staff at CTF is recognized even by Defendants' expert penologist Dr. Ryan. (R. 11-102.) The Administration has dealt with the need for extra staff by using overtime. (McCathorine Dep. at 115-16.) Overtime, however, frequently causes "staff burnout" (R. 5-13.) and is recognized by Mr. Quander as not being a long term solution. (R. 8-29.)

Defendants have hired approximately 70 new officers and have the authority to hire an additional 130. (R. 8-27 to 28.) It is unclear how many of these guards will work with women prisoners at CTF. Defendants also claim that the problem with escorts has been corrected by using school passes and designating an elevator operator specifically for women prisoners who are students. (R. 9-119 to 120.)

34/ Occoquan is a "controlled movement" facility that houses the most violent medium custody male prisoners. (Braxton Dep. at 16.) The dormitory doors are locked and an inmate must have a pass to traverse one of the three zones except for meal and recreation time. *Id.* at 22. Men do not need an escort unless they are being disciplined, in protective custody or awaiting bed space. *Id.* at 24.

b. Vocational Education

Graphic Arts is the primary vocational program offered to women at CTF. (R. 5-22.) It is associated with the Docutech Program Lab and there are thirteen women participating in the program right now. (R. 9-33.) It meets five days a week for two and one-half hours in the morning and approximately two hours in the afternoon. Only minimum custody women can join. (Pls. Ex. 306 at DC0018562-63.) The Youth Act women who reside at CTF are required by a consent decree to be in vocational training and fill 2 of the spots. (Pls. Ex. 294 at DC0018420-21; R. 9-33.)

CTF also offers programs in computer literacy, sewing and typing. (Pls. Ex. 306 at DC0018564.) A prerequisite for the computer literacy program is an eighth-grade achievement level. (R. 5-23.) While these are listed as vocational programs, they do not have a classroom component. (R. 5-24.) Furthermore, there have been problems with teachers not appearing for class. (R. 5-23.) Dr. Ryan believes that the Defendants should offer at least one more program. (R. 11-96.)

The men's facilities offer an abundance of vocational opportunities and apprenticeships. (Pls. Ex. 517.) Central offers 15 different programs: Auto Body, Auto Mechanics, Barber Science, Brickmasonry, Building Maintenance, Business Typing, Carpentry, Culinary Arts, Digital Electronics, Drywall, Electricity, Graphic Arts, Landscape, Photography, and Plumbing. (R. 5-24; Pls. Ex. 674.) Medium Facility offers Brickmasonry, Drywall/Painting, and Word Processing. (R. 5-24.) At the Occoquan Facility there is Digital Electronics, Graphic Arts and Photography. (R. 5-25.) All three of the male facilities offer ETAP which is a prevocational course. (R. 5-25.)

Mr. Vincent Gibbons, the Administrator of Central, stated that it would be "an absolute nightmare" if women were escorted to Central to participate in vocational training. (Gibbons Dep. at 92.) Mr. Gibbons claimed that his position rested on "a combination of factors" but only managed to say that "fraternization" would jeopardize prison security. (Gibbons Dep. 93-95.)

On the staff reaction to the presence of women, Mr. Gibbons stated the following:

> [E]arly on, there was a lot of suspicion and a lot of concern about the fact that this was going to pose a major security crisis . . . However, that was short lived and everyone has been very, very impressed with how few problems there have been and with the fact that the women are generally pretty amicable. They are easy to get along with, friendly, produce good work, and again, I have spoken to the shop foreman on a regular basis.

(Gibbons Dep. at 120-21.)

No apprenticeships are available to women at CTF. (R. 5-25.) At Central there are programs in Carpentry, Culinary Arts, Dental Technology, Electricity, Plumbing and Upholstery. (R. 5-25.)

c. Work Details

CTF lists the following as work details: maintenance, culinary, clerical assignments, education aides, environmental, intake, landscape, offices, quick copy, rec clerk, religious, supply management, unit. (Pls. Ex. 363.)

Central offers 25 work details which include those found at CTF, but also give men the opportunity to practice trades

like plumbing, carpentry, bricklaying, mechanics, painting, welding, air conditioning, and masonry. (R. 5-30; Pls. Ex. 674 at 3.) Medium offers the typical support jobs but again offers some trades in painting, plumbing, and electrical work. (R. 5-30.)

Finally, Occoquan offers the standard support jobs but includes barbering, carpentry, electrical work, heating, painting and plumbing. (R. 5-30 to 31.)

The salary which residents command depends on the skill level of the job and demonstrated proficiency. The range is between $ 6 and $ 21 a month with the higher salaries reserved for jobs requiring a trade skill. (R. 5-31.)

d. Industries

At Central there are 10 industries such as Accounting, Furniture Repair, Garment Shop, Print Shop, Upholstery and Metal Shop. (R. 5-35.) Medium offers Furniture Repair and Metro Shop. (Pls. Ex. 674; R. 5-35.) At Occoquan there is a Garment industry. (R. 5-35.)

Though the Defendants referred to plans for an industrial program (R. 8-104.) the only program remotely like an industry is Docutech which as of April 1994 pays some women an industrial rate of pay.[35/] (R. 10-A-4.) Defendants' expert penologist Dr. Ryan and the Defendants' Female Offenders Program Coordinator Ms. Regina Gilmore stated that there is no industry at CTF. (R. 11-74; R. 9-28.)

[35/] Four positions are at the non-industrial rate of $ 9.25 a month; three women receive full-time industrial pay of $ 60 a month and the remaining six women work part-time and receive part-time industrial pay. (R. 9-33 to 34.)

Dr. Ryan believes that CTF should create an industry. (R. 11-74.) Single gender shifts are possible if the administration is able to fill the shift with enough workers and if two shifts can be run in a cost effective manner. (R. 11-107.)

e. Recreation

As in other areas of life at CTF, the physical structure and staffing adversely influence the recreational options for women. The women have to be taken to the recreation area and supervised while the men at the other medium security facilities are not supervised. (R. 5-44.)

The scheduled recreation for women at CTF is one hour a day, five days a week and access to the gymnasium for two hours, three times a week. (R. 5-41; Pls. Ex. 424 at DC0027044.) There is also low-impact aerobics two days a week for an hour each day. (R. 9-121.) Plaintiffs' expert penologist Ms. Lancaster stated, "This recreation time is more like segregation. This is what I am more used to with segregated inmates, . . . not for general population inmates." (R. 5-41.) She added, "To have one hour a day of outside time when you haven't done anything wrong and you're not in segregation I think is really unacceptable." (R. 5-42.)

Defendants have recognized these limitations on women from the beginning. In an April 15, 1992 letter to Federal Correctional Programs Division, Mr. Arthur Graves, Associate Director for Operations of DCDC, asked that women who had parole eligibility dates "well beyond the year 2000" not be returned "since these women will not have the opportunity for extensive outside activities while housed at the CTF . . . ." (Pls. Ex. 320.)

Mr. Vince Gibbons, the Administrator at Central, said that the men at his facility may go outside between 7:00 a.m.

and 10:00 p.m. (Gibbons Dep. at 129-30.) They can play cards, sports, or other outdoor activities at Medium, according to Mr. Krull, "Men can have recreation all day long." (Krull Dep. at 66.) At Occoquan, men have five hours of open time during the winter and seven hours of recreation a day during daylight saving time. Mr. David Roach, the Administrator at Maximum, said that men at the Maximum Facility generally have 1-to-2 hours of recreation in the morning and 1-to-2 hours in the afternoon. (Roach Dep. at 17.) All of this can be spent outdoors, weather permitting. (Roach Dep. at 18.)

The outdoor recreation programs at CTF occur in a small area which allows for basketball and volleyball. (R. 5-43.) There is a gymnasium and a weight room. The three men's facilities have group sports such as basketball, football, softball, soccer, and volleyball. (R. 5-43.) Central has a track, a handball court, an arts and crafts program and a drama program. (R. 5-43.) Medium also has a track and a handball court. (R. 5-43.) Occoquan has a track, a field, horse shoes, weights, and handball. (R. 5-43.)

f. Smoking Privileges

Men at the three facilities may smoke outside in designated areas. Smoking is absolutely prohibited within CTF. (Pls. Ex. 249 at DC0009722.) CTF primarily houses prisoners who are receiving treatment for drug addiction and this ban is part of the facility's substance abuse treatment concept. (R. 5-53.)

III. CONCLUSIONS OF LAW

A. Claims Under 42 U.S.C. § 1983

The elements of a claim under 42 U.S.C. § 1983 are generally satisfied if a plaintiff can demonstrate that a person

acting "under color of state law" deprived the plaintiff of a federal right.[36/] Municipalities and local government officials sued in their official capacities are considered "persons" under the statute, *Monell v. Department of Social Services*, 436 U.S. 658, 690 & n.55, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978), and action taken pursuant to power conferred by state law and made possible because a person "is clothed with the authority of state law, is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184, 5 L.Ed.2d 492, 81 S. Ct. 473 (1961). The Defendants plainly are persons acting under color of state law within the meaning of § 1983. The dispute in this case centers on whether a federal rights have been violated and whether the Defendants caused the violations to occur.

A municipality is liable where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Department of Social Services*, 436 U.S. 658, 690, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978). It is also liable for "deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id.* at 691.

[36/] Section 1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Supreme Court, though generally divided on what constitutes a municipal "policy," has ruled that a municipality is liable for constitutional violations which result from the municipalities failure to train its employees. *Canton v. Harris*, 489 U.S. 378, 103 L.Ed.2d 412, 109 S. Ct. 1197 (1989). This may arise when "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390.[37]

B. The Eighth Amendment

Today, there is no serious constitutional argument against the proposition that the conditions within a prison are subject to scrutiny under the Eighth Amendment. The United States Supreme Court has stated:

> When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being . . . The rationale for

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[37] In the Defendants' Proposed Conclusions of Law, they submit that the doctrine of official immunity shields them from all claims under 42 U.S.C. § 1983. A claim of immunity, however, is not a bar to prospective injunctive relief against a government official acting in an official capacity. *See Pulliam v. Allen*, 466 U.S. 522, 541-42, 80 L.Ed.2d 565, 104 S. Ct. 1970 (1984). Nor does the claim of immunity bar an award of attorney's fees. *Id.* at 543-44. The standard for immunity is whether an official knew or should have known that what they were doing violated the Constitution. Here the relief requested is prospective and a finding by this Court that the Defendants have violated the Constitution provides notice that future such acts or failures to act will violate the Constitution. There can be no good faith. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.34, 73 L.Ed.2d 396, 102 S. Ct. 2727 (1982).

> this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by the Eighth Amendment.

Helling v. McKinney, 125 L.Ed.2d 22, 113 S. Ct. 2475, 2480 (1993) (quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199-200, 103 L.Ed.2d 249, 109 S. Ct. 998 (1989)).

In *Wilson v. Seiter*, 501 U.S. 294, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991), the Supreme Court provided the framework which courts must use when deciding whether certain conditions of confinement constitute cruel and unusual punishment. Plaintiffs in prison conditions cases must satisfy objective and subjective standards before a court can find that a correctional institution has violated the Eighth Amendment.

Under the objective standard, plaintiffs must demonstrate a deprivation which amounts to a wanton and unnecessary infliction of pain. *Rhodes v. Chapman*, 452 U.S. 337, 347, 69 L.Ed.2d 59, 101 S. Ct. 2392 (1981). Though a condition may be harsh, it is a constitutional element of a prisoner's penalty if it is not cruel and unusual relative to contemporary standards of decency. *Rhodes v. Chapman*, 452 U.S. 337, 347, 69 L.Ed.2d 59, 101 S. Ct. 2392 (1981). Since the Constitution "does not mandate comfortable prisons, . . . only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991). The Eighth Amendment does not protect prisoners from inadvertent injury or errors in good faith. *Whitley v. Albers*, 475

U.S. 312, 319, 89 L.Ed.2d 251, 106 S. Ct. 1078 (1986).

The combination of some conditions of confinement may constitute an Eighth Amendment violation though each would not do so alone, "but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise - for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson v. Seiter*, 501 U.S. 294, 304, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991).

A condition which has not caused any present injury may still violate the Eighth Amendment if it "is sure or very likely to cause serious illness and needless suffering." *Helling v. McKinney*, 125 L.Ed.2d 22, 113 S. Ct. 2475, 2480 (1993). In these situations a Court must then determine whether society considers this risk to be so serious that it violates contemporary standards of decency. *Id.* at 2481.

A court may assess contemporary standards with the help of expert opinion, but such information does not define the "constitutional minima" and "cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction." *Rhodes v. Chapman*, 452 U.S. 337, 348 n.13, 69 L.Ed.2d 59, 101 S. Ct. 2392 (1981) (quoting *Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27, 60 L.Ed.2d 447, 99 S. Ct. 1861 (1979) and *Gregg v. Georgia*, 428 U.S. 153, 173, 49 L.Ed.2d 859, 96 S. Ct. 2909 (1976)).

The subjective standard requires plaintiffs to prove that prison officials acted with "deliberate indifference" to inmate health or safety. *Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970, 1977 (1994). The Supreme Court has stated:

> A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of

> confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 1979.

A factfinder may make inferences about a prison official's state of mind by examining circumstantial evidence and in some cases, "conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* at 1981. Plaintiffs could prove that prison officials had actual knowledge of a risk if the risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it . . . ." *Id.* While prison officials may prove that they were ignorant of an obvious risk or thought of the risk as insubstantial, an official may not refuse to investigate facts or inferences that he strongly suspects indicate the existence of a condition which violates the Eighth Amendment. *Id.* at 1982 n.8. Officials who know of the substantial risk to inmate safety, however, may escape liability if they respond reasonably to the risk, even if the harm still occurs. *Id.* at 1982-83.

In a suit for injunctive relief to correct a substantial risk of serious injury, the subjective dimension of the Eighth Amendment analysis should be determined by examining the attitudes and conduct of prison officials at the time suit is brought and thereafter. *Id.* at 1983. If at trial a plaintiff adequately proves the existence of an objectively intolerable risk of serious injury, the prison authorities could not possibly claim that they are subjectively unaware of the risk since the trial itself puts them on notice. *Id.* at 1983 n.9. Despite the

fact that officials might have been subjectively culpable at the beginning of the case, an injunction will not be issued if they prove during the litigation that "they [are] no longer deliberately indifferent to an objectively intolerable risk of harm and that they would not revert to their obduracy upon the cessation of litigation." *Id.*

C. Sexual Harassment at the Annex, CTF and the Jail

1. *The Eighth Amendment*[38/]

Under the objective standard, Plaintiffs have demonstrated a deprivation which amounts to a wanton and unnecessary infliction of pain. The evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency. The physical assaults endured by women prisoners at the Annex, CTF and the Jail unquestionably violate the Eighth Amendment. Rape, coerced sodomy,

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[38/] Whereas convicted Plaintiffs bring a cause of action under the Eighth Amendment, pretrial detainee Plaintiffs rely upon the Fifth Amendment guarantee of due process. *Brogsdale v. Barry*, 288 U.S. App. D.C. 311, 926 F.2d 1184, 1187 (D.C. Cir. 1991). Though the unconstitutional conditions may be the same, "the threshold for establishing a constitutional violation is clearly lower for the pretrial detainees." *Brogsdale v. Barry*, 288 U.S. App. D.C. 311, 926 F.2d 1184, 1187 n.4 (D.C. Cir. 1991). The standard is whether the prison conditions "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535, 60 L.Ed.2d 447, 99 S. Ct. 1861 (1979). The Court's ruling that the sexual harassment visited upon women convicts violates the Eighth Amendment means *a fortiori*, that such harassment violates the Fifth Amendment rights of pretrial detainees.

In addition, Plaintiffs claim that the sexual harassment from which they suffer violates their rights to equal protection of the law under the Fifth Amendment. Since the Court holds that this sexual harassment violates the Eighth Amendment, the Court will not unnecessarily reach out to define the contours of the Fifth Amendment as applied to sexual harassment.

unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are "simply not part of the penalty that criminal offenders pay for their offenses against society." *See Farmer v. Brennan*, 128 L.Ed.2d 811, 114 S. Ct. 1970, 1977 (1994).

In combination, vulgar sexual remarks of prison officers, the lack of privacy within CTF cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners.

There is a substantial risk of injury when officers make sexual remarks in an environment where sexual assaults of women prisoners by officers are well known and inadequately addressed. In free society, a woman who experiences harassment may seek the protection of police officers, friends, coworkers or relevant social service agencies. She may also have the option of moving to locations where the harassment would no longer occur. In sharp contrast, the safety of women prisoners is entrusted to prison officials, some of whom harass women prisoners and many of whom tolerate the harassment. Furthermore, the women are tightly confined, making their escape from harassment as unlikely as escape from the jail itself.

Routine invasions of bodily privacy, such as men peering into women's cells at CTF or the unannounced presence of male guards in female living areas provide a reminder to women prisoners that their exposure to abuse is almost endless. Though the Court is aware that in some instances, security concerns will take priority over privacy interests, the evidence did not show security based reasons for an inability to furnish women some privacy or for the refusal of some guards to announce their presence. The exposure of pri-

soners' bodies without any justification is unacceptable and increases the level of anxiety experienced by women prisoners.[39/]

The health problems created by sexual harassment furnish more than enough evidence to satisfy the objective component of the Eighth Amendment analysis. Dr. Susan Fiester, the Plaintiffs' expert in the area of sexual harassment and sexual misconduct, demonstrated that the abuse caused significant depression, nausea, frequent headaches, insomnia, fatigue, anxiety, irritability, nervousness, and a loss of self-esteem.[40/] Though some female prisoners have not suffered as much as the named Plaintiffs in this case, sexual harassment within the three facilities is so pervasive that other women prisoners are very likely to suffer serious harm in the future.

The Court finds also that the Defendants have violated the subjective standard of the Eighth Amendment by acting with "deliberate indifference" to the condition of sexual harassment which women prisoners at the three facilities must endure. The Court finds that Defendants knew of and disregarded an excessive risk of sexual assaults and harassment of women prisoners. The evidence demonstrated that the women prisoners filed complaints with the police and they sent IGP's and letters of complaint to prison administrators. The circumstantial evidence allows at least the inference of

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[39/] The Court will not review these complaints under a claim of a constitutional right of privacy because they are adequately addressed under the Eighth Amendment.

[40/] On the issue of damage caused by sexual harassment, the Court relies on the testimony of Dr. Fiester only to show the objective results of Defendants' actions. The Court takes the necessary next step of finding an objective violation of the Eighth Amendment by referring to contemporary standards of decency.

deliberate indifference since the harassment was so obvious. Indeed, assaults are widely known by DCDC staff, vulgar comments are made openly and women are fondled publicly.

The Defendants demonstrate further disregard for women prisoners by failing to respond reasonably upon discovering instances of sexual harassment. There is no staff training on the subject of sexual harassment of women prisoners. There are no posted procedures for filing an IGP and no instructions or procedures for reporting harassment of women prisoners. Consequently, there is no clear understanding of what constitutes sexual harassment and how it should be reported. Some employees go to the Director, others do nothing but tell other employees who then pass the story along the grapevine. Some employees do not report an incident because the Defendants do not keep sensitive information confidential and do not conduct effective investigations.

The lack of confidentiality also causes women prisoners to suffer the additional trauma of having the small community in which they live know the details of a degrading assault. They may also be the targets of retaliation. By leaking private information prison officials coerce women prisoners and staff into silence and insulate themselves from scrutiny.

Those women prisoners who do pursue their case have little cause for hope because investigations are not taken seriously. The record shows that the Defendants often respond slowly and superficially to allegations of sexual misconduct. Mr. Krull admitted that the DCDC has no policy for investigating sexual misconduct. Mr. Henderson, as the Administrator of the Jail would not initiate investigations into sexual misconduct and left it to the police. Mr. Plaut believed that he had to wait for a conviction before he could take action. The invariable result is that cases "cannot be resolved" and officers who commit the assaults are often

reassigned to another facility or allowed to remain in the same facility. The Court does not believe that a reasonable attempt to investigate sexual misconduct within the three facilities would so consistently achieve inconclusive results. The Court also believes that the reassignment of assaultive guards communicates to employees that sexual misconduct is not a serious matter, thus permitting future assaults.

Defendants also respond to allegations of sexual misconduct by placing the alleged victim in protective custody. Protective custody is the same treatment given to inmates when they are being punished. There is no reason for a women prisoner to feel safe in isolation when an attacker can gain access to her cell.

The Court finds that the Defendants have not proven during the litigation that they are no longer deliberately indifferent to the sexual harassment which occurs at the three facilities. Assaults continued to occur after the filing of this suit and a month before trial, a Deputy Warden told a woman prisoner that she should not provide information to a lawyer representing the Plaintiffs in this case. There is also no evidence that the Defendants have changed their approach to staff training, reporting and investigations.

The Court concludes that the Plaintiffs have proven an Eighth Amendment violation by demonstrating a level of sexual harassment that is objectively cruel and to which the Defendants are deliberately indifferent.

2. *42 U.S.C. § 1983*

The sexual harassment which the Plaintiffs suffer is the result of a governmental custom which has not received formal approval through the body's official decisionmaking channels. In discussing sexual harassment, the former

Administrator at CTF, Mr. Howard Ray Jr., suggested that sexual misconduct is a "custom" when he stated that it has always happened and will continue into the future.

The Court holds the Defendants liable under 42 U.S.C. § 1983 because guards at the three facilities inflict injury on the women while executing a government custom of sexual harassment, notwithstanding the Defendants' official policies regarding sexual misconduct.

The evidence also demonstrates that the Defendants fail to properly train their employees in the area of sexual harassment of women prisoners. The only substantive training in the area of sexual harassment focuses on harassment in the workplace. Considering the duties of officers at the three facilities, the need for training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, the Court finds that the Defendants are deliberately indifferent.

The Court, therefore, finds that the sexual harassment of women prisoners at the Annex, CTF and the Jail violates 42 U.S.C. § 1983.

D. Obstetrical and Gynecological Care at CTF[41/]

1. *D.C. Code § 24-442 (1989)*[42/]

Plaintiffs claim that the lack of adequate obstetrical and gynecological care violates the law of the District of Columbia as embodied in D.C. Code § 24-442 (1989). This statute states in pertinent part:

> [The] Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to [facilities under its jurisdiction).

D.C. Code § 24-442 (1989).

This statute encompasses the common law rule which imposes upon prison authorities and employees, a duty to exercise reasonable care in the protection and safekeeping of prisoners. *Hughes v. District of Columbia*, 425 A.2d 1299, 1302 (D.C. App. 1981). In order to prevail on a claim under this statute, a "plaintiff must establish by competent evidence a standard of care; that the defendant violated the standard;

[41/] Access to adequate obstetrical and gynecological care of women prisoners at the Annex is under review in the case of *Inmates of Three Lorton Facilities v. District of Columbia*, No. 92-1208 (D.D.C.) and issues relating to obstetrical and gynecological care at the Jail are controlled by *Campbell v. McGruder*, No. 1462-71 (D.D.C.).

[42/] The Court believes that the obstetrical and gynecological care of women prisoners at CTF is more appropriately addressed by the D.C. Code rather than the Eighth Amendment. The Court may consider this issue pursuant to it pendent jurisdiction over D.C. Code claims arising out of the same nucleus of operative fact. *Financial General Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768, 769 (D.C. Cir. 1982).

and that such violation proximately caused injury to the plaintiff." *Id.* A plaintiff must establish a lack of proper correctional care by demonstrating with competent expert testimony, or other supporting proof, that what occurred in the case was "a negligent deviation from the demonstrated acceptable standard." *Id.* at 1303. A plaintiff is required to offer expert testimony where the subject matter at issue is "so distinctly related to some science, profession, or occupation as to be beyond the ken of the average layperson." *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. App. 1988). In the area of medical care, physicians owe the same standard of care to prisoners as physicians owe to private patients generally. *District of Columbia v. Mitchell*, 533 A.2d 629, 648 (D.C. App. 1987).

Once plaintiffs demonstrate a deviation from the accepted standard they must then present evidence from which a reasonable trier of fact could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries and that the injuries were foreseeable. *Bell v. Jones*, 523 A.2d 982, 995 (D.C. App. 1986).

The Plaintiffs established the appropriate standard of care through Dr. Major who is a board-certified physician specializing in obstetrics and gynecology. (Pls. Ex. 639; R. at 3-41.) Dr. Major referred to community and national standards in the field of obstetrics and gynecology, specifically the American College of Obstetrics and Gynecology. (R. 3-45.) He also relied on his 35 years of experience as an obstetrician and gynecologist. Five of those years were spent directing obstetrical and gynecological services in a correctional institution. (Pls. Ex. 639 at 1; R. at 3-45.)

The evidence demonstrates that the Defendants have deviated from the standard of acceptable medical care for

women prisoners. The Court holds that the record supports Dr. Major's testimony as to the following deviations from the general standard of adequate medical care: deficient gynecological examination and testing (R. 3-58.), inadequate testing for sexually transmitted diseases (R. 3-73 to 3-74.), inadequate follow-up care (3-79 to 3-80, 3-83.), grossly inadequate health education (R. 3-86.), inadequate prenatal care (R. 3-94.), inadequate prenatal protocol (R. 3-95.) and ineffective prenatal education (R. 3-115.). These problems are compounded by the Defendants' inability to provide a reliable system of transportation or a confidential sick call process. Consequently, women prisoners miss appointments for lack of a vehicle or refuse help for fear of revealing the details of their medical history.

The Defendants even deviate from their own standards. The Defendants do not follow the Memorandum of Understanding which requires multilevel consultation between D.C. General and CTF, the Defendants do not follow their policy of thorough intake examinations and health education and they do not follow the policy of comprehensive prenatal care.[43/]

These deviations are the proximate cause of foreseeable injury to the Plaintiffs. The Defendants' failure to thoroughly educate women prisoners results in refusals of medical help. Inadequate examinations and follow-up treatment permit cervical and breast cancer, opportunistic infections in AIDS patients, sterility as a result of chlamydia and gonorrhea, peritonitis from gonorrhea, and aortic aneurysms, dementia, psychosis or death from syphilis. Even conditions that are ultimately benign may cause great discomfort.

[43/] In the area of prenatal nutrition, the Court does not find enough evidence to hold that the amount or quality of nutrition which Defendants provide to pregnant women prisoners violates D.C. Code § 24-442.

A penologically unnecessary arrangement which contributes to the diminution of life expectancy, an increase in pain, the delivery of a baby in a jail cell, and the anxiety of a prolonged wait for potentially life-saving medical procedures is intolerable. This is particularly true in the many cases where a lack of transportation or confidentiality impedes treatment.

Defendants have made some efforts to correct deficiencies in prenatal care by holding parenting classes, prenatal exercise classes and a "therapeutic community". Though these are positive measures, the creation of the exercise classes and the "therapeutic community" so close to trial calls into question the permanence of these measures. Nonetheless, the necessary reforms in obstetrical and gynecological care must be more comprehensive to bring the Defendants into compliance with D.C. Code § 24-442.

2. *The Eighth Amendment*

Plaintiffs raise several additional claims which are on the periphery of obstetrical and gynecological care: shackling of pregnant women prisoners, child visitation and child placement counseling.[44/] The Court believes that these matters are best resolved by *Wilson v. Seiter* analysis rather than the approach of *Estelle v. Gamble*, 429 U.S. 97, 50 L.Ed.2d 251, 97 S. Ct. 285 (1976) which addresses the provision of medical services to prisoners.

Plaintiffs have demonstrated that the manner in which the

[44/] The Plaintiffs also claim that the Defendants provide insufficient post-partum counseling. The Court does not find enough evidence in the record to support this claim.

Defendants shackle pregnant women prisoners in the third trimester of pregnancy and immediately after delivery poses a risk so serious that it violates contemporary standards of decency. The Court understands that the Defendants may need to shackle a woman prisoner who has a history of assaultive behavior or escapes. In general, however, the physical limitations of a woman in the third trimester of pregnancy and the pain involved in delivery make complete shackling redundant and unacceptable in light of the risk of injury to a woman and baby. The Court believes that leg shackles adequately secure women prisoners without creating an inhumane condition of confinement during the third trimester. While a woman is in labor and shortly thereafter, however, the Court holds that shackling is inhumane.

The combination of a lack of child visitation and inadequate child placement counseling at CTF constitute an Eighth Amendment violation because they have a mutually enforcing effect which results in an unacceptable risk of trauma for women prisoners who have recently delivered babies. Few events could be more stressful than the forced separation of a parent from his or her child. Though the injuries which flow from the Defendants' actions in this area are primarily psychological, there is nothing to suggest that the Eighth Amendment is limited to physical injury. *See Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 1004, 117 L.Ed.2d 156 (1992) (concurring opinion, Blackmun, J.)

The Court finds that the Defendants have acted with deliberate indifference in these areas since the risk of injury to women prisoners is obvious. Deputy Warden Jones stated that he would not shackle a third trimester woman which suggests that he recognizes the risk.

The Defendants recognize that such a separation for women prisoners, in most cases, is extremely painful. It is,

however, unfortunately necessary in order for a mother to serve her sentence. But to forbid child visitation while a baby is at D.C. General serves no penological purpose. Similarly, denial of adequate child placement counseling furthers no legitimate correctional policy. Both deprivations plainly heighten a mother's anxiety to an unreasonable level.

The evidence which emerged through litigation failed to demonstrate that the Defendants were no longer deliberately indifferent to the need for greater child visitation and child placement counseling. The evidence did not show that the Defendants no longer continue to fully shackle third trimester women prisoners.

3. *42 U.S.C. § 1983*

The Defendants shackle third trimester pregnant women prisoners pursuant to official policy. Though the Defendants have a policy which calls for child placement counseling, the Defendants are liable because the custom of the Defendants is to provide inadequate counseling in these areas. The Defendants deny adequate child visitation as a result of an unwritten but closely followed policy. The Court, therefore, finds that the shackling of third trimester women prisoners, inadequate child placement counseling and the lack of child visitation at CTF violate 42 U.S.C. § 1983.

E. Fire Safety at the Annex

1. *The Eighth Amendment*

The Plaintiffs have shown that the living conditions of women prisoners at the Annex present a risk of injury by fire so serious that it violates contemporary standards of decency. The Court finds the testimony of Mr. Jaeger, the Plaintiffs' expert in the field of fire safety, to be helpful with respect to

the fire safety of the Annex.[45/] His expert testimony demonstrated that several conditions working in concert create an objectively intolerable situation. The Annex dormitories are overcrowded, they carry a heavy combustible load, the walls cannot contain a fire within any room, only one fire exit consistently remains unlocked, there is no fire alarm system, there is no sprinkler system and fire drills are not regularly conducted. The Administration Building, the gymnasium and cafeteria have a poor fire alarm system.

The Court finds that each of these conditions has a mutually enforcing effect of exposing residents to an unconstitutionally intolerable risk of injury by fire. These conditions are at least very likely to cause serious illness and needless suffering. The Court does not have to wait for the Plaintiffs to be incinerated before it can order the Defendants to raise the level of fire safety at the Annex.

Application of the subjective standard of the Eighth Amendment shows that the Defendants have acted with deliberate indifference to the risk of fire at the Annex. The Court finds that the Defendants knew that a substantial risk of serious harm to inmate health or safety existed and they disregarded the risk.

The Annex fire hazards are longstanding, pervasive, well-documented, and expressly noted by prison officials. The Warden at Minimum has acknowledged that the absence of an adequate fire alarm system creates a hazard to residents.

[45/] Though Mr. Jaeger called the level of fire safety at the Annex "grossly inadequate", the Court must determine whether these specific inadequacies amount to a constitutional violation by referring to the contemporary standards of decency as reflected in what the public attitude toward the conditions at the Annex would be.

Even without Mr. Stempson's statements, Mr. Jaeger demonstrated the existence of fire hazards at the Annex, thus defeating any claim that the Defendants are not aware of fire hazards at the Annex.

The Defendants, however, have not proven during the litigation that they are no longer deliberately indifferent to the lack of fire safety at the Annex. Mr. Quander requested another survey to verify the findings in the a report that was accepted by the DCDC Fire Marshal. He had no knowledge as to who is responsible for the survey and when it will be finished. Even Mr. Stempson justified his request for a fire alarm system by referring to the cost of a lawsuit. Many conditions which preclude litigation, however, have nothing to do with living conditions in a facility. The Court can easily imagine several factors which might have prevented a suit in this case: prisoner ignorance of legal claims, inability to obtain counsel or the desire of short-term residents not to antagonize the administration so close to their release date. The fire hazards at the Annex should have been corrected regardless of any legal action. References to litigation costs suggest that the Defendants in this instance will respond only to court orders.

The Court holds that the Defendants' failure to move promptly to ameliorate the fire hazards at the Annex amounts to deliberate indifference.

2. *42 U.S.C. § 1983*

Clearly, the Defendants do not have an official policy which requires the Defendants to create a firetrap at the Annex. But the Court does find that the deplorable level of fire safety at the Annex is the consequence of a decision by the Defendants not to correct the conditions which they acknowledge are hazardous.

In addition, the evidence demonstrates that written policies notwithstanding, the Defendants fail to train their employees in the area of fire safety and the Defendants do not follow their plan which calls for quarterly drills. Since the Defendants' inadequate training is so likely to cause injury to the approximately 170 women prisoners who must be evacuated during a fire, the Court concludes that the Defendants have been deliberately indifferent. Consequently, the Court finds that the lack of fire safety at the Annex violates 42 U.S.C. § 1983.

F. General Conditions at the Annex

1. *The Eighth Amendment*

The Plaintiffs have shown that the living conditions of women prisoners at the Annex violate contemporary standards of decency. The combination of certain conditions of confinement satisfies the objective component of Eighth Amendment analysis because the conditions are very likely to cause serious illness and needless suffering. The infestation of roaches, torn mattresses, inadequate bathing and toilet facilities, excessive crowding, lack of mechanical ventilation, unclean floors, inadequate drainage, inadequate lighting, and uncovered dumpsters all have been shown to raise the risk of illness and injury to a constitutionally unacceptable level. The filthy condition of the kitchen area at Minimum, food served at hazardously low temperatures, the failure to use liners in the laundry carts, and inadequate ventilation at the printing and garment shop also expose women prisoners to a similarly unacceptable risk of illness and injury.

The Court has located conditions which violate the Eighth Amendment not because they produce surroundings which are unattractive or food which is unappetizing. These conditions are cruel and unusual because they combine to create an

unconstitutionally high exposure to illness or injury. Furthermore, the Court finds these conditions unconstitutional not because the Plaintiffs' environmental health expert, Mr. Duel, summarized them as "unacceptable". They are unconstitutional because his expert testimony specifically demonstrated the particular illnesses and injuries which are likely to result from each of the conditions and because the Court finds that these hazards violate contemporary standards of decency.

Apart from the previously mentioned conditions, the Court is reluctant to find unconstitutional anything which simply increases "stress" unless it is truly egregious. For this reason the Court does not find that the daytime noise levels significantly threaten the health of women prisoners.

Application of the subjective standard of the Eighth Amendment shows that the Defendants have acted with deliberate indifference to the inhumane conditions at the Annex. The Defendants were aware of facts from which they inferred the existence of a substantial risk of serious harm to women prisoners and they disregarded the risk. Mr. Krull's suggestion that the placement of short-term offenders at the Annex would reduce the risk of a lawsuit suggests a general strategy to avoid repairing poor conditions.

But the record also contains much evidence of Defendants' recognition of specific problems. Ms. Gilmore recognized in July 1993 that repair needs of the Annex had reached "crisis proportions." The record also contains letters in which inmates notified the administration about other "deplorable" conditions and even offered to repair the defects. The Court believes at the very least, that conditions at the Annex are so obviously unhealthy that the Court may infer the Defendants' deliberate indifference.

Yet, the Defendants have not proven during the litigation

that they are no longer deliberately indifferent to the inhumane conditions at the Annex. Since the Defendants have made no significant improvements at the Annex they certainly cannot claim that they have responded reasonably to the risk since discovering it. A June 1994 inspection revealed little change: a repaired roof, a replaced kitchen ceiling, new lighting for the walk-in coolers, bathrooms for women at the garment shop and improved delivery of food at the industries. The improvements, occurring so close to trial and easily capable of deterioration, do not persuade the Court that these limited areas of concern are permanently improved. Even if these changes were permanent, they would not bring the level of safety at the Annex to the constitutional minimum of acceptability.

2. *42 U.S.C. § 1983*

As with the fire hazards at the Annex the Court cannot find a policy statement which permits such awful conditions to persist at the Annex. Nonetheless, these conditions remain because the Defendants customarily refuse to provide residents at the Annex with a living environment that satisfies the Constitutional minimum. Consequently, the Court finds that the unhealthy living conditions at the Annex violate 42 U.S.C. § 1983.

G. Fire Safety at CTF

1. *D.C. Code* § 24-442 (1989)[46/]

The evidence revealed a variety of problems at CTF. There is a lack of maintenance and testing of certain elements of the present fire protection system. The sprinkler system is not being adequately maintained and tested. There is maintenance of the fire pump but no testing. Fire drills are held infrequently. There is water leakage in the basement where electrical equipment is exposed. Storage in some of the culinary spaces block the sprinkler system.

Plaintiffs claim that the lack of fire safety violates the law of the District of Columbia as embodied in D.C. Code § 24-442 (1989). The Court infers from the statute an obligation of prison authorities and employees to exercise reasonable care in the "protection" and "safekeeping" of prisoners from fire hazards. Mr. Justin Taylor, the Defendants' expert in the field of fire safety, testified that the sprinkler system should be tested quarterly. Mr. Jaeger demonstrated that standards require annual testing of the fire pump. Mr. Jaeger also explained how the leakage of water threatened to get into the electrical conduit and electrical equipment and cause a fire. The national standard for fire drills calls for four drills per shift per year.

The Court finds that the Defendants failure to test the

[46/] The Court believes that the issue of fire safety at CTF is more appropriately addressed by the D.C. Code. As with the issue of obstetrical and gynecological care at CTF, the Court considers this issue pursuant to it pendent jurisdiction over D.C. Code claims arising out of the same nucleus of operative fact. *Financial General Bankshares, Inc. v. Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768, 769 (D.C. Cir. 1982).

sprinkler system quarterly, the failure to maintain the sprinkler system, the failure to test the fire pump annually, the leakage of water in the basement and culinary area, the failure to conduct adequate fire drills and the blocking of the sprinklers in the culinary spaces all violate D.C. Code § 24-442.

H. General Conditions at CTF

1. *The Eighth Amendment*

The Plaintiffs have shown that the living conditions of women at CTF present a health risk so serious that it violates contemporary standards of decency.

The combination of conditions surrounding the inadequate heating unit create an objective violation of the Eighth Amendment. The malfunction in the heating unit causes freezing temperatures in cells. In addition, not all women are given an adequate number of blankets for warmth. This is the precise example of an Eighth Amendment violation offered by the Supreme Court in *Wilson v. Seiter*, 501 U.S. 294, 304, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991).

Other conditions at CTF combine to increase the risk of illness among women prisoners. The evidence demonstrated a problem with mice, a lack of liners in the laundry carts, inoperable toilets in cells, a lack of cleaning supplies, unsanitary kitchen facilities, hazardous special diet meals and shower leaks which cause ceiling tiles to fall. In addition, the malfunction of the heating unit causes poor ventilation. As with similar conditions at the Annex, the expert testimony demonstrated a clear link between these conditions and various diseases and injury.

The Defendants have acted with deliberate indifference to these conditions at CTF. The Court finds that the Defendants

have been aware of these conditions, know of their danger and have not made any significant changes. Since January 1993, the Defendants have known that cells housing women prisoners were extremely cold. The Defendants have known about the rodent problem since at least September 1993. CTF staff admitted to Mr. Duel that there was an internal distribution problem with supplies. (R. 6-62 to 63.)

The Defendants have not proven during the litigation that they are no longer deliberately indifferent to the inhumane conditions at CTF. Mr. White, Chief of Facilities at CTF, informed Mr. Duel that he has doubts about recent efforts to fix the heating system. There is no evidence that problems with food preparation, mice, laundry carts, toilets, cleaning supplies and shower ceiling tiles have been fixed. The situation with the special diets at CTF had improved but the nutritionist who made many of the improvements in food delivery may not have long-term employment at CTF. The Court is not satisfied that the positive changes in this area are permanent.

2. *42 U.S.C. § 1983*

The Court finds that the longstanding health hazards which exist at CTF are the result of a decision by the DCDC not to promptly abate these hazardous conditions. The Court therefore, finds that the Defendants are liable under 42 U.S.C. § 1983.

I. Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 provides, in relevant part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

assistance. . . ." 20 U.S.C. § 1681(a).[47] The Plaintiffs ask the Court to apply this statute to the programs offered to women prisoners at the Annex and CTF.

Not many cases in the federal courts have dealt with the issue of Title IX's applicability to prison education programs or activities. The Ninth Circuit, however, recently explored the issue in *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). That case involved a class of women prisoners who alleged, inter alia, that the Oregon State Department of Corrections violated Title IX and its regulations by discriminating against women prisoners in six educational and vocational training programs in the Oregon penal system. *Id.* at 1222. The court in *Jeldness* held that "state prisons receiving federal funds are required by Title IX to make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality." *Id.* at 1229. The Court believes that this is an accurate reading of Title IX.

The plain language of Title IX indicates that the statute applies to "any education program or activity receiving Federal financial assistance" with certain statutory exceptions. 20 U.S.C. § 1681(a). Prisons are not listed as an exception to Title IX. The Court has no reason to infer from the statute or its regulations that Congress intended for Title IX not to cover prisons. As the *Jeldness* court indicated, Congress amended Title IX on two occasions after two federal courts applied the statute to prisons, yet Congress did not add an exemption for prisons on either occasion. *See id.* at 1225

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[47] The Defendants concede that they receive federal funding. (Defs. Answer to Int. No. 2.)

(referring to *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ken. 1982), vacated on other grounds, 869 F.2d 948 (6th Cir. 1989), and *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986)).

In order to determine the extent of Title IX's coverage, courts have referred to Title VI of the Civil Rights Act of 1964. Since Title IX uses the same language as Title VI, courts generally hold that they require the same levels of protection and equality. *Cannon v. University of Chicago*, 441 U.S. 677, 696, 60 L.Ed.2d 560, 99 S. Ct. 1946 (1979). But Title VI is a useful guide in construing Title IX only to the extent that the language and history of Title IX do not suggest a contrary interpretation. *Northhaven Board of Education v. Bell*, 456 U.S. 512, 529, 72 L.Ed.2d 299, 102 S. Ct. 1912 (1982). Though the Supreme Court has stated that the protection provided by Title VI is not broader than that offered by the Equal Protection Clause of the Fifth Amendment, *University of California Regents v. Bakke*, 438 U.S. 265, 287, 325, 57 L.Ed.2d 750, 98 S. Ct. 2733 (1978) (opinion of Powell, J.; Brennan, White, Marshall, Blackmun, JJ., concurring), Title IX and Title VI use the same language and therefore, as a matter of statutory interpretation, they should be read to require the same levels of protection and equality. *Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9th Cir. 1994). "They should not be read to require different levels of protection [simply] because the Equal Protection Clause is interpreted differently for race than for gender." *Id.* at 1227-28.

During congressional debates on the provisions which became Title IX, Senator Bayh, who introduced the legislation stated:

> While the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an impor-

> tant first step in the effort to provide for the women of America something that is rightfully theirs — an *equal* chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.

118 Cong. Rec. 5808 (1972) (Emphasis added). In response to questions about the legislation, the Senator said, "This amendment sets no quotas. It only guarantees *equality* of opportunity." 118 Cong. Rec. 5812 (1972) (Emphasis added).[48/]

In *Northhaven Board of Education v. Bell*, 456 U.S. 512, 72 L.Ed.2d 299, 102 S. Ct. 1912 (1982), the Supreme Court examined Title IX's legislative history and held, "Although the statements of one legislator made during debate may not be controlling. . . , Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *Id.* at 526-27. The legislative history, therefore, makes clear that Title IX requires equality of treatment, nothing less.

The language of Title IX's implementing regulations suggest that they apply to correctional institutions as well. They propose to cover "any education program or activity

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[48/] Senator Bayh's intentions were made clear the previous year when he introduced similar legislation and stated: "What we are trying to do is provide *equal* access for women and men students to the educational process. . . ." 117 Cong. Rec. 30407 (1971) (emphasis added), and "the bill. . . seeks to assure *complete equality* of access to educational opportunity." 117 Cong. Rec. 30412 (1971) (emphasis added). The Senate never voted on this measure because it was ruled nongermane. 117 Cong. Rec. 30415 (1971).

receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution. . . ." 34 C.F.R. § 106.1. The regulations also define a "recipient" as

> [A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. sec. 106.2(h). Like Title IX, the regulations list specific exceptions which do not include prisons.

Title IX's implementing regulations specifically target areas of concern. They prohibit sexual discrimination "under any academic, extracurricular, . . . occupational training or other education program or activity operated" by an entity that receives federal funds. 34 C.F.R. § 106.31(a). The denial of access to course offerings on the basis of sex is forbidden. 34 C.F.R. § 106.34. A recipient of federal funds must also provide equal athletic opportunity. 34 C.F.R. § 106.41. Finally, the regulations prohibit discrimination in the provision of employment opportunities and apprentice training programs. 34 C.F.R. § 106.38 and Pt. 100, App. B, VII-A & VII-B.

Under Title IX and its implementing regulations, prisons may not have to offer as many classes in the typically smaller female prison as opposed to the typically larger male prison, but the number of classes offered should at least be proportionate, not just to the total number of inmates, but to the number of inmates desiring to take educational programs. *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1994). In

addressing the requirements of Title IX, a prison may not prevail by simply using penological necessity as a defense since it is just one factor in how the equality principles of Title IX are to be applied. *Id.* at 1230. In addition, a desire to preserve the state's limited resources cannot be used to justify an allocation of those resources which unfairly denies women equal access to programs routinely available to men. *Canterino v. Wilson*, 546 F. Supp. 174, 211 (W.D. Ky. 1982).

There is disagreement in the federal courts as to the state of mind required for a violation of Title IX. The Court again notes the Supreme Court's holding that "the drafters of Title IX explicitly assumed that it would be interpreted [like] . . . Title VI . . . .", *Cannon v. University of Chicago*, 441 U.S. 677, 696, 60 L.Ed.2d 560, 99 S. Ct. 1946 (1979), and that a majority of justices have stated that Title VI requires "intentional discrimination" in order to prove a statutory violation. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 608 n.1, 77 L.Ed.2d 866, 103 S. Ct. 3221 (1983) (Powell, J., concurring) ("Seven members of the Court agree that a violation of [Title VI] requires proof of discriminatory intent.").[49/]

[49/] Under Title VI's implementing regulations, proof of discriminatory effect suffices to establish liability. *See Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 584 n.2, 77 L.Ed.2d 866, 103 S. Ct. 3221 (1983) (opinion of White, J.). Some courts conclude that discriminatory intent is equally unnecessary for a violation of Title IX's regulations. *See Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 832-33 (10th Cir. 1993); *Haffer v. Temple University*, 678 F. Supp. 517, 539-40 (E.D. Pa. 1987). A review of Title IX's implementing regulations demonstrates an emphasis on the "effects" and "impact" of a defendant's policies. The Court finds no requirement of intent in the regulations. *See* 34 C.F.R. §§ 106.21(b)(2) (prohibits tests for admission which have disproportionately adverse effect, unless test is valid predictor), 106.22 (no admission

(continued...)

Discriminatory intent, however, is only an issue in cases involving facially neutral policies. *See Personnel Administrator of Massachusetts v. Finney*, 442 U.S. 256, 274, 60 L.Ed.2d 870, 99 S. Ct. 2282 (1979). When a classification is expressly defined in terms of gender, an inquiry into intent is unnecessary. *Canterino v. Barber*, 564 F. Supp. 711, 714 (W.D. Ky. 1983). Defendants policy of segregating male and female prisoners is just such a gender-based policy. By virtue of their gender, women prisoners are sent to certain facilities which offer program opportunities that are different from those offered in the male facilities. Though the reason for sex-based segregation in prisons is rational, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect." *United Automobile Workers v. Johnson Controls*, 499 U.S. 187, 199, 113 L.Ed.2d 158, 111 S. Ct. 1196 (1991).

1. *"Similarly Situated" Analysis*

The Court will compare prisoners who are similarly situated by virtue of their similar custody levels, sentence structures and purposes of incarceration. The Court finds that women prisoners at the Annex are similarly situated to the male prisoners at Minimum and the Court also finds that

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[49]/(...continued)
preference for graduates of single sex schools if preference has discriminatory effect), 106.23(b) (no recruitment primarily at single sex schools if it has discriminatory effect), 106.34(d) (prohibits physical education skill standard which has adverse effect on one sex), 106.37(b) (prohibits award of sex-restricted forms of financial assistance which have overall effect of sexual discrimination), 106.52 (prohibits any employment criterion which has disproportionate adverse impact unless it validly predicts successful performance), 106.53(b) (prohibits recruitment at entities which furnish job applicants of one sex if it has effect of sexual discrimination); *See also Sharif By Salahuddin v. New York State Education Dept.*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989).

women prisoners at CTF are similarly situated to the male prisoners at Occoquan, Central and Medium.

The women prisoners incarcerated at the Annex like the male prisoners at Minimum are within two years of a presumptive release date. (Pls. Ex. 621 at WP00034, WP00033 at 6.) Both of these populations are preparing for release into the community and therefore, have the same need to fully prepare themselves for this stage of their lives.

The women prisoners at CTF are medium custody, general population inmates.[50/] Medium custody general population men are sent, in order of security level, to either Occoquan, Central or Medium. (Gibbons Dep. at 43-44.) A comparison to CTF men would be inappropriate because the men reside at CTF for either short-term diagnostic attention or a voluntary 18-month intensive substance abuse program. (Pls. Ex. 319.) In contrast, the Plaintiffs who reside at CTF do not choose to live at there. (R. 8-66.)

Each of the male facilities perform different functions. Occoquan is a sentence-serving institution for "male felons who decline to participate in the high intensity programming offered at Central Facility." (Pls. Ex. 621 at WP00035; Gibbons Dep. at 44.) The purpose of Central is to provide program opportunities to prisoners "who wish to participate in high intensity and comprehensive programming." (Pls. Ex. 621 at WP00032.) Medium is designed to prepare prisoners for the transition to a minimum security facility, a halfway house or parole. (*Id.* at 44.; Krull at 35.) It is possible for the men at Medium to transfer to the other two facilities and

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[50/] At CTF, 104 women are serving sentences of one to two years, 84 women are serving sentences of three to four years and 19 women are serving sentences of five or more years. (R. 11-45.)

men from the other facilities may be sent to Medium. (Krull Dep. at 34.) If an inmate at Medium has certain programming needs that are only available at Occoquan or Central then the Defendants will try to send him to one of those facilities. (Krull Dep. at 38.) The record, therefore, demonstrates that medium custody men generally have access to all of the programs offered at the three medium custody male facilities.

The Defendants argue that because women prisoners have needs which are unique to women prisoners, a comparison to male prisoners is inappropriate. (Defs. Trial Brief at 2-18.) The Defendants point to a variety of differences to support their argument, although there is evidence that the Defendants recognize that the "programming needs [of females] are the same as those for males." (Pls. Ex. 291 at DC0018353.)

The Defendants argue that women prisoners are less violent than male prisoners and therefore, need more supervision. (*Id.* at 11.) This argument, in the context of an all female program is counterintuitive. Supervision generally increases with an inmate population that poses a greater risk of violence. This distinction in the context of a co-correctional program is nothing more than a disguised "prison security" argument which is appropriate to a determination of how a program will be implemented not whether two groups are similarly situated.

The Defendants argue that women prisoners are victims of sexual abuse in greater numbers than male prisoners and therefore have lower self-esteem which makes them more dependent than men. (*Id.*) The Court does not find any evidence that women prisoners are afflicted with lower self-esteem than male prisoners or that they are more dependent than men. The evidence demonstrates that women prisoners are victims of sexual abuse in numbers dispropor-

tionate to men. This abuse causes a loss of self-esteem. Logically, this does not mean that male prisoners could not also suffer from low self-esteem for any number of other reasons.

The Defendants argue that women have more acute problems with substance abuse. (*Id.* at 11-12.) The record does not demonstrate this to be true either. The programming inequalities that exist rest on top of presumptively equal access to drug treatment.

The Defendants argue that women are more likely to have the responsibility of caring for a child. (*Id.* at 12.) It would be truly ironic if this unfortunately true difference succeeded as a rationale for unequal opportunity in educational, recreational, religious and work programs. Though prisons should have leeway in determining how best to address the parenting responsibilities of women, "parenting programs" are not a valid substitute for educational and occupational programs. Title IX embodies a Congressional recognition that education and employment are the primary routes by which women may materially improve their lives. The Defendants emphasis on other programs subverts the policies underlying the statute.

The Defendants finally argue that women prisoners have unique employment needs because they have less support in the community than men. (*Id.*) As with the previous argument, the Defendants prove too much. The lack of support added to child care responsibilities supports an argument for greater access to educational and occupational programs, not less.

The Court believes that the "unique needs and characteristics" mentioned by the Defendants, if true, should be addressed above and beyond their need for the programs at issue in this case, not as a substitute. A majority of the

"unique characteristics" mentioned by the Defendants are also some of the burdens which historically have prevented women from achieving equality of opportunity. To use these characteristics to defeat a comparison of men and women prisoners would vitiate Title IX and also suggest that men and women could never be compared.

2. *Title IX and Programs at the Annex*[51/]

At the Annex, the Defendants have not made reasonable efforts to offer the same educational opportunities to women as to men. For the most part, women prisoners do not have reasonable opportunities for similar studies and do not have an equal opportunity to participate in programs of comparable quality. The Court will briefly analyze each area of programs under Title IX and its implementing regulations.

The failure to provide women with equal access to academic and college education violates Title IX and 34 C.F.R. § 106.31(a). In the area of academic and college education, women prisoners receive only half of the male prisoners' access to ABE and GED classes. This is insufficient, not simply because it takes longer for women to finish the courses, but because they are unable to win good time credits. Course length is important particularly at the Annex because women serve shorter sentences and need to complete the courses before they are released.

The inequality is worsened by the Defendants failure to anticipate foreseeable problems. Classes have been canceled upon the teacher's illness and a broken air conditioner. The

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51/ Plaintiffs do not challenge the programs available to women prisoners at the Jail because these issues are controlled by the orders and decrees in *Campbell v. McGruder*, No. 1462-71 (D.D.C.).

Defendants could easily ameliorate this problem by adding an additional teacher and providing adequate facilities.

In the area of college education, Men at Minimum and women at the Annex have access to 2 pre-college UDC classes. The Court holds, however, that women do not have a reasonable opportunity for similar studies because the Defendants do not escort the women prisoners to class in a timely manner.

In the area of vocational training and apprenticeships, women at the Annex and men at Minimum have equivalent access to meager offerings. The Court finds no violation of Title IX.

The Defendants failure to provide equivalent opportunity in the area of work details violates Title IX, 34 C.F.R. § 106.38(b), 34 C.F.R. § 106.31(a), and 34 C.F.R. Pt. 100, App. B, VII-A. Work details at Minimum are not only more numerous but better in quality than those offered at the Annex. The men perform details that prepare them for trades which command better salaries outside of prison. There is hardly a comparison of the stereotypical details at the Annex (receptionist, housekeeper, beautician, etc.) and the skilled details at Minimum (carpentry, electrical, mechanical, etc.)

The Court does not find that the Defendants offer women prisoners at the Annex unequal access to industrial programs in violation of Title IX. Women may participate in the garment and print shops while men may participate in the new industries of dairy and landscape. While the Plaintiffs argue that women prisoners could work well at the other industries at Central, they have failed to prove that women prisoners at the Annex do not receive industrial opportunities equivalent to male prisoners at Minimum. The Plaintiffs' argument may make sense as policy but it falls short of demonstrating

inequality.

In the area of work training the Defendants violate Title IX and 34 C.F.R. §§ 106.31(a), 106.38(a)(1) and Pt. 100, App. B, VII-A. The large difference in participation between men and women is the result of sluggish processing of paperwork, the absence of an automobile to take women to interviews and the failure to publicize work training opportunities at the Annex. Dr. Ryan, the Defendants' expert penologist, gave an example of a good work release program that failed because among other things the facility did not provide the women with sufficient transportation. (R. 11-53 to 11-54.) Subsequent programs succeeded because transportation, counseling, education and child support were furnished. (R. 11-54.)

As in the other areas, men received training for jobs which required more skill than those jobs held by the women. Though some of these jobs involve stereotypically male skills, the Defendants may not justify unequal treatment by pointing to the limited availability of some occupations for women. 34 C.F.R. § 106.7.

The Defendants failure to provide comparable recreational facilities violates Title IX and 34 C.F.R. § 106.41(a), (c) and the failure to provide equivalent activities violates Title IX and 34 C.F.R. § 106.31(a). Access to a trailer for a couple of hours a day and the Minimum facilities for several hours a week is not comparable to the recreational opportunities for men at Minimum who have almost unlimited access to a gymnasium, a weight trailer and a ball field. The number of men might explain the size of different facilities but it does not explain the large difference in quality. There is also no reason why the women do not have anything remotely similar to the drama club offered to the men at Minimum.

Women prisoners do not have equal opportunity in the area of religious programs in violation of Title IX and 34 C.F.R. § 106.31(a). The women have only limited access to a chaplain. In addition, the Annex does not offer a place to worship which is comparable to the men's chapel at Minimum. Distractions occur as a result of the need to share space with prisoner visitations, thus harming the quality religious offerings.

3. *Title IX and Programs at CTF*

The Defendants have not made reasonable efforts to offer the same educational opportunities to women as to men. Women at CTF do not have reasonable opportunities for similar studies and do not have an equal opportunity to participate in programs of comparable quality.

The pronounced inequality in academic and college educational opportunity clearly violates Title IX and 34 C.F.R. § 106.31(a). Not one woman at CTF has the opportunity to receive the amount of education offered to similarly situated men. The women of CTF have only 3 hours of ABE or GED classes whereas the men at Medium and Occoquan have 5½ hours of study and the men at Central have 8 hours of study. Women prisoners are also hindered by tardy escorts and class schedules which conflict with vocational classes.

The availability of college education is abysmal as well. A woman must first apply for a Pell grant which similarly situated men generally need not do. Then she must try to learn through the use of a computer without the aid of a teacher. Even if she is successful the limit of her opportunity is an AA degree. Men at all of the other facilities may obtain a four year college degree from instructors who teach at the facilities.

Women prisoners suffer obvious inequalities in vocational programs and apprenticeships in violation of Title IX and 34 C.F.R. § 106.31(a). Vocational opportunities for women at CTF are virtually non-existent. The Graphic Arts program is closed off to medium custody women. The other offerings are stereotypically female and have no classroom component. Similarly situated men at Central have numerous opportunities to participate in substantive vocational programs. Men at Occoquan and Medium have several offerings. Apprenticeships are not available to women at CTF whereas there are some at Central and one at Occoquan.

The lack of equivalent opportunity in the area of work details violates Title IX, 34 C.F.R. § 106.38 (b), 34 C.F.R. § 106.31(a), and 34 C.F.R. Pt. 100, App. B, VII-A. Work details at CTF are stereotypically female and low-skilled. They are not nearly equivalent to the details at the men's facilities which help men to establish marketable trades.

The lack of equivalent opportunity in the area of industries violates Title IX, 34 C.F.R. § 106.38(b), 34 C.F.R. § 106.31(a), and 34 C.F.R. Pt. 100, App. B, VII-A. There are no industries at CTF and the Defendants have no plausible excuse for the absence of industrial opportunities. Defendants sound a note of alarm at the thought of female participation in industries at Central but the Defendants concede that women prisoners do fine work in the garment shop. Furthermore, there is no evidence of a bona fide attempt by Defendants to establish an industry for women prisoners at CTF.

As with the academic education, the denial of equal recreation time is a result of the controlled-movement design of the facility. In a situation of lopsided opportunities this may be the most egregious inequality. Similarly situated men are given a degree of recreational freedom that might surprise many citizens while women at CTF, the overwhelming

majority of whom are non-violent, experience a degree of confinement more stringent than men at the Maximum Facility. This violates Title IX and 34 C.F.R. § 106.41(a).

J. The Fifth Amendment and Equal Protection

Since the remedial devices in Title IX sufficiently cover discrimination in educational programs, the Court will not review those programs under the Equal Protection Clause. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 20, 69 L.Ed.2d 435, 101 S. Ct. 2615 (1981) (remedial devices in a federal statute may demonstrate congressional intent to preclude suit under § 1983). This is consistent with the federal policy of avoiding constitutional adjudication where not absolutely essential to the disposition of a case. *Hagans v. Lavine*, 415 U.S. 528, 547 n.12, 39 L.Ed.2d 577, 94 S. Ct. 1372 (1974). The Court will however, use the Equal Protection clause to review the denial of smoking privileges at CTF since that claim is not covered by Title IX.[52/]

The fundamental purpose of the Equal Protection Clause is to compel the government to treat equally all people who are similarly situated. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985). Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197, 50

[52/] Equal protection principles apply to federal action through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L.Ed. 884, 74 S. Ct. 693 (1954).

L.Ed.2d 397, 97 S. Ct. 451 (1976).[53] Anyone defending such a policy must provide an "exceedingly persuasive justification" for it. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 73 L.Ed.2d 1090, 102 S. Ct. 3331 (1982).

Women prisoners at CTF may not smoke because smoking is inconsistent with the substance abuse treatment of other inmates with whom the women share the facility. The Court holds that the treatment of inmates for substance abuse is an important governmental objective and the non-smoking policy is substantially related to that objective. The smoking policy of CTF, therefore, does not violate the Equal Protection Clause.

JUNE L. GREEN
U.S. DISTRICT JUDGE

Dated: December 13, 1994

ORDER FOR DECLARATORY
AND INJUNCTIVE RELIEF

Based upon the Court's findings of fact and conclusions of law, it is by the Court this 13th day of December 1994, ORDERED that:

1. The Defendants' actions and inactions violated and

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[53] The Court does not reach the issue of whether this case is distinguishable from *Pitts v. Thornburgh*, 275 U.S. App. D.C. 332, 866 F.2d 1450 (D.C. Cir. 1989), and subject to the standard provided in *Turner v. Safley*, 482 U.S. 78, 96 L.Ed.2d 64, 107 S. Ct. 2254 (1987), because the Court holds that the Defendants have not violated the Plaintiffs' Equal Protection rights even under the heightened scrutiny standard.

continue to violate the Plaintiff class members' rights under the Fifth and Eighth Amendments to the United States Constitution, 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988), and the District of Columbia Code §§ 24-442; and

2. The Defendants are ordered to take all action necessary to remedy and prevent the violations of the Plaintiffs' above-mentioned rights. The Defendants are ordered to take the following specific measures in the areas of sexual harassment, obstetrical and gynecological care, programs and opportunities, and environmental and fire safety. All measures shall be completed and in effect within six months of the date of this Order, unless otherwise specified.

I. SEXUAL HARASSMENT

3. Within 60 days, the Defendants shall write and follow a Department Order prohibiting sexual harassment involving District of Columbia Department of Corrections (DCDC) employees and women prisoners. The Defendants shall post and circulate the Department Order in accordance with departmental policy.

4. Under this policy the DCDC has the obligation to take appropriate steps to prevent and remedy sexual harassment committed by its own employees.

5. One or more members from the office of Grace M. Lopes, Special Officer of the U.S. District Court for the District of Columbia, will monitor allegations of sexual harassment at each facility in which women prisoners are housed. The monitor(s) shall log in each allegation of sexual harassment, investigate the allegations, submit the results of the investigation to the Warden of the relevant facility and the Director of the DCDC and keep records of the Defendants'

resolution of the matter, including disciplinary actions, of such claims.

6. The monitor(s) shall investigate all outstanding allegations of sexual harassment and shall submit a report on each allegation to the Warden of the relevant facility, and to the Director of the DCDC.

7. Prohibited conduct under the policy shall be defined as:

a. Sexual harassment which includes:

(1) all unwelcome sexual activity directed by any DCDC employee at a prisoner including acts of sexual intercourse, oral sex, or sexual touching and any attempt to commit these acts; and

(2) all unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature directed by any DCDC employee at a prisoner; and

b. Invasions of women prisoners' privacy by male employees without a valid penological reason, including the failure of any male employee to announce his presence when entering a female housing unit.

c. Retaliation for reporting complaints of, assisting any individual in making a report of, or cooperating in an investigation of sexual harassment, regardless of the merits or the disposition of the underlying complaint. Retaliatory conduct includes the following actions taken against a prisoner in response to that prisoner's complaint of sexual harassment or cooperation in the reporting or investigation of sexual harassment:

disciplining, changing work or program assignments of, transferring to another facility of, or placing under involuntary protective custody any prisoner.

d. Any breach of confidentiality by any employee concerning any report of sexual harassment.

e. Any interference with investigations of sexual harassment.

8. Penalties for prohibited conduct under the policy shall be worked out by the Director of the DCDC and the Court's Special Officer Ms. Grace Lopes within 30 days of this Order.

9. Women prisoners shall be able to report instances of sexual harassment through the existing Inmate Grievance Procedure (IGP) as specified in Department Order 4030.1D. The Defendants shall strictly adhere to the Inmate Grievance Procedure and shall establish an Inmate Grievance Advisory Committee (IGAC) as required by Section VII(C) of Department Order 4030.1D.

10. Women prisoners shall also be able to submit IGP's or complaints concerning sexual harassment in any form, orally or in writing, to any DCDC employee, who must submit the information, in writing, to the monitor(s) and Warden of the facility within 24 hours of receiving the information. Women prisoners may also submit IGP's or complaints to an [sic] prisoner representative to the IGAC.

11. The Defendants shall establish a confidential hot line, under the supervision of the monitor(s), through which women prisoners can report allegations of sexual harassment.

12. Each employee shall be required to report any information, from any source, concerning sexual harassment,

in writing, to the Warden of the facility and to the monitor(s) within 24 hours of receiving the information. Failure of an employee to report any suspected incident of sexual harassment shall subject the employee to discipline. If a prisoner so requests, the prisoner shall be treated as an anonymous informant.

13. The monitor(s) shall ensure that each reported violation of the policy is thoroughly investigated and documented. The monitor(s) shall submit a final written report to the Warden of the institution; the report shall include factual findings and a conclusion as to whether a preponderance of evidence shows that a violation of the sexual harassment policy occurred. Within 48 hours after the Warden receives the monitor(s)' report, the Defendants shall inform the complaining woman prisoner, in writing, of the outcome of the investigation. The Warden shall take appropriate action as detailed in the schedule of penalties.

14. Upon receipt of any allegation of an act of unwelcome sexual intercourse or any allegation of unwelcome sexual touching, the monitor(s) and the institution must notify the proper law enforcement agency. The monitor(s) shall communicate with the law enforcement agency concerning the status of any investigation. The monitor(s) must periodically document the status of police investigations. The occurrence of a police investigation does not relieve the monitor(s) of the duty to investigate.

15. The identity of the target of the alleged sexual harassment shall be revealed only to those who have an immediate need to know, including the monitor(s), the alleged harasser(s) or retaliator(s) and any witnesses. All parties contacted in the course of an investigation will be advised that any retaliation, reprisal, or breach of confidentiality is a separate actionable offense as provided in the schedule of

penalties.

16. Any prisoner who is dissatisfied with any investigation or resolution of an allegation of sexual harassment may appeal to the Director of the DCDC within 15 days of receiving written notice of the outcome of the investigation. The Director must respond within 15 days.

17. Within 90 days, a trainer from the National Institute of Corrections (NIC), mutually agreed upon by the parties, shall conduct mandatory training on sexual harassment for all DCDC employees who work with women prisoners. The trainer shall be selected within 60 days. The monitor(s) if they so choose, may attend this training.

a. The training shall include education concerning the Defendants' policies regarding reporting, investigating, and preventing sexual harassment, and the consequences for violating any policy concerning sexual harassment; and

b. In addition to roll call training, formal training sessions on sexual harassment shall be conducted on a quarterly basis for all years succeeding entry of this Court Order.

18. Within 90 days, an outside consultant, mutually agreed upon by the parties, shall develop a sexual harassment training program and materials and conduct training on sexual harassment for women prisoners so that women prisoners know how to recognize and report sexual harassment. The trainer shall be selected within 60 days.

a. The training materials must be included in the orientation that each woman receives upon intake or classification at each facility; and

b. Formal training sessions for women prisoners on sexual harassment shall be conducted on a monthly basis for the first year succeeding entry of the consent decree, and on a quarterly basis in all years thereafter that this decree shall remain in effect.

19. The Defendants shall make necessary alterations at both the Correctional Treatment Facility (CTF) and the Minimum Security Annex (Annex) within 60 days to ensure that women have privacy in their living, sleeping and shower areas.

II. OBSTETRICAL AND GYNECOLOGICAL CARE

20. The Defendants shall hire within 60 days:

a. a nurse midwife in a half-time position who shall provide clinical and health educational services to the entire female prisoner population; and

b. an additional nurse practitioner or physician's assistant with special training in obstetrics and gynecology to provide clinical services to women prisoners at CTF.

21. The CTF OB/GYN Clinic shall maintain its current regularly scheduled hours.

22. The Defendants shall establish a prenatal clinic at CTF for women who receive their primary prenatal care at CTF. This clinic shall operate at least one half-day each week. Pregnant women shall not be required to make appointments for the prenatal clinic through the sick-call process, but rather, shall have scheduled appointments for the clinic.

23. The Defendants shall maintain statistics on the number of pregnant women and the birth outcomes of infants

whose mothers delivered while incarcerated.

24. In addition to the general health interview and observation performed for male prisoners, the intake screening for all women prisoners shall include specific inquiry about her use of contraceptives or intrauterine devices, history of pregnancy, last known menstrual period, current likelihood and history of sexually transmitted diseases and pattern of drug use (if applicable).

25. In accordance with DCDC policy, the Defendants shall inform all women prisoners of the procedure to access health services while incarcerated.

26. In addition to the health appraisal conducted for male prisoners, the Defendants shall conduct a gynecological examination, including a pelvic examination and evaluation, a breast examination accompanied by patient education, a PAP smear, a chlamydia and gonorrhea culture, and a serology for syphilis. In accordance with the CTF Operations manual and National Commission on Correctional Healthcare (NCCHC) and American Correctional Association (ACA) standards, this health appraisal shall occur within 14 days of admission into the DCDC, unless there is documentation of a complete and comparable health appraisal within the previous 90 days.

27. The Defendants shall develop and implement within 90 days, an appropriate health appraisal form to correspond with the ordered health appraisal for women noted in paragraph 26.

28. The Defendants shall develop and implement within 90 days, detailed written protocols concerning routine and follow-up care for common gynecological problems including syphilis, gonorrhea, chlamydia, and pelvic inflammatory disease; PAP tests; pelvic examinations; breast examinations;

education in contraception and mammography for high-risk women, in accordance with the standards of the American College of Obstetrics and Gynecology (ACOG).

29. The Defendants shall provide gynecological care within the time frames and in a manner consistent with gynecological protocols that satisfy ACOG standards unless a physician determines that in his or her medical judgment it is not medically appropriate for such care to be provided in accordance with the protocol, in which case the reasons for this determination shall be entered into the patient's medical record.

30. At a minimum, the protocol concerning the provision of gynecological care shall provide that the Defendants shall offer and make available PAP tests to all high-risk women at CTF every six months.

31. The Defendants shall maintain a list of abnormal PAP results and, within seven days of receipt of an abnormal PAP result, shall notify the patient of the abnormal result and develop and initiate a course of treatment.

32. All women who receive an abnormal PAP test result shall be scheduled for a repeat PAP test at three-month intervals until the PAP test results are normal. Once the PAP test results are normal, a PAP test shall take place every six months. If a culdoscopy is required, it shall be performed in a manner and within time frames accepted as appropriate by ACOG standards.

33. The Defendants shall implement within 60 days a tracking system to insure that all women receive appropriate preventive gynecological care at regular intervals.

34. If a pregnancy test reveals that a woman is pregnant,

routine prenatal care shall be initiated immediately.

35. The Defendants shall develop and implement a protocol concerning restraints used on pregnant and postpartum women which provides that a pregnant prisoner shall be transported in the least restrictive way possible consistent with legitimate security reasons. Specifically, the protocol shall provide:

a. The Defendants shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery.

b. During the last trimester of pregnancy up until labor, the Defendants shall use only leg shackles when transporting a pregnant woman prisoner unless the woman has demonstrated a history of assaultive behavior or has escaped from a correctional facility.

36. The Defendants shall develop and implement within 90 days, a detailed written prenatal protocol for women who receive their primary prenatal care at CTF in accordance with ACOG standards. The protocol shall also provide guidelines to define "high-risk pregnancy." High-risk pregnancies shall be considered to include at a minimum those women with histories of alcohol and drug abuse, sexually transmitted diseases, diabetes or anemia, older women, women with poor obstetrical histories, and women expecting multiple births.

37. The Defendants shall arrange for each pregnant woman prisoner to see an obstetrician at monthly intervals during the first two trimesters of her pregnancy, bi-monthly intervals during the seventh and eighth months, and weekly intervals during the ninth month. The Defendants shall arrange for women who are experiencing high-risk pregnancies to see an obstetrician at shorter than routine intervals until

it is determined that the pregnancy is progressing normally.

38. The Defendants shall implement a tracking system to insure that all pregnant women are scheduled and seen regularly for prenatal care.

39. The Defendants shall permit a woman prisoner to feed her baby at D.C. General Hospital while the woman prisoner and baby remain at D.C. General Hospital.

40. The Defendants shall develop a routine visiting program for women whose children remain in D.C. General Hospital. These women shall be allowed to visit their children at D.C. General Hospital every day.

41. In accordance with the Defendants' Department Order, pregnant women prisoners shall receive counseling regarding child placement as soon as the pregnancy is known.

42. The Defendants shall designate a representative who shall develop and maintain contacts with licensed child-placing agencies, including the Department of Human Services. The Defendants shall provide training to its social workers on the range of options available for child placement, including third-party placement with family or friends, foster-care placement, and adoption. Each woman shall be given information about each of the options.

43. The nurse midwife shall implement within 90 days an obstetrical and gynecological health education program that satisfies a recognized national medical standard. Education material should also be made available in the CTF library. The Defendants shall maintain adequate documentation on the program so that it can be evaluated by the Court within 60 days after implementation.

44. The Defendants shall have at least one medical staff member available at CTF 24 hours each day.

45. CTF medical personnel shall have telephone access to the OB/GYN physician at CTF during evening and weekend hours.

46. If a woman prisoner is in need of emergency obstetrical or gynecological care during evening or weekend hours, she shall be taken immediately to the emergency area in the OB/GYN clinic at D.C. General Hospital, unless employees providing obstetrical and/or gynecological care at D.C. General Hospital determine that the main emergency room at D.C. General Hospital would be more medically appropriate.

47. The Defendants shall provide each woman prisoner who is discharged from custody with the following:

a. a supply of essential medications that will last until she may be reasonably expected to obtain necessary follow-up care in her community; and

b. referrals to services in the community to insure continuity of care.

48. If a woman is released prior to the time that results of any gynecological or obstetrical tests are received by CTF medical personnel, the Defendants shall forward the test results to her last known mailing address.

49. The Defendants shall provide sufficient resources to insure that prisoners are transported to medical appointments in a timely fashion, including a sufficient number of security staff to transport prisoners, appropriate and sufficient transport vehicles, and appropriate waiting areas.

50. The Defendants shall modify their transportation procedures so that the transportation system alone does not cause women prisoners to wait for more than one hour at D.C. General Hospital before receiving medical care.

51. If a woman prisoner misses a medical appointment for any reason, the Defendants shall reschedule the appointment for the earliest available date. The Defendants shall use their best efforts to insure that the rescheduled appointment occurs within a medically appropriate period of time.

52. The Defendants shall comply fully with all provisions of the Memorandum of Understanding between the DCDC and D.C. General Hospital.

53. The Defendants shall assign a physician, or a member of the medical staff at CTF, who provides obstetrical or gynecological care, to serve as a liaison between CTF medical personnel and D.C. General Hospital.

54. The Defendants shall maintain the content of each medical record in an orderly and confidential manner.

55. For all pregnant women prisoners, the Defendants shall maintain a medical chart on the POPRAS form pregnancy chart, or an equivalent form, together with a regular medical chart. All medical visits to or by the responsible physician or primary healthcare provider, orders for laboratory tests, laboratory test results and other notes and orders relating to the medical care of pregnant women prisoners shall be recorded on the POPRAS form or consultation form.

56. The Defendants shall develop and implement within 90 days, a new consultation form that provides adequate clinical information to D.C. General Hospital and insures that adequate information is provided by D.C. General Hospital to

CTF medical personnel.

57. The Defendants shall institute, maintain and follow a system to coordinate the implementation and tracking of physician orders so that gynecological and obstetrical care will be provided within a timely fashion. The system shall coordinate all orders regardless of whether the physician orders are to be filled inside or outside the facility. This system shall be reflected in written procedural guidelines, a copy of which shall be provided to counsel for Plaintiffs within 60 days. Orders for medication are not to be tracked under this system.

58. Documentation shall be required whenever CTF medical staff elect not to follow the instructions of a consulting physician at D.C. General Hospital or elsewhere. This documentation should include the justification for not providing the therapy ordered. Only medically-based justifications shall be permissible.

59. For all women prisoners who are discharged from D.C. General Hospital or other medical facilities to CTF, CTF medical personnel shall promptly obtain a discharge summary and maintain the summary in the prisoner's medical record.

60. Prisoners shall receive notice of results of laboratory or diagnostic tests which are of no clinical significance within seven calendar days of the date the facility receives the results of such test.

61. In the case of non-emergency abnormal laboratory or diagnostic test results of clinical significance, the prisoner will be seen by the ordering physician, or if that physician is unavailable, by the Medical Officer, within 24 hours of the time the facility receives the results of such test. At such time

the physician will explain the result to the patient and order such follow-up care as is appropriate.

62. The Defendants shall require a woman prisoner who refuses medical care to do so in the presence of a licensed medical staff member who can answer the patient's questions and counsel the patient concerning the consequences of a refusal. In accordance with DCDC policy regarding quality assurance, the reasons for refusal shall be analyzed regularly as part of a comprehensive and up-to-date quality assurance program. This quality assurance activity shall be documented.

III. PROGRAM EVALUATION

63. The Defendants shall provide diagnostic evaluations for women prisoners similar to those currently provided for men in the Reception and Diagnostic Unit at CTF to determine women prisoners' needs, interests, and requirements for increased programs and opportunities in academic and higher education, vocation, work, religion and recreation. The procedure for the needs assessment shall be done by an approved scientific method. These evaluations shall be completed within 30-45 days of a female prisoner's transfer to CTF or the Annex. The evaluations shall include educational testing, vocational testing and psychological testing. The Defendants shall provide women with the appropriate programming called for by this evaluation within 60 days of their arrival at the facility.

64. The Defendants shall coordinate the scheduling of academic educational classes, higher education classes, vocational training, recreation time and activities, law library hours, and work in prison details for women in such a manner as to maximize women prisoners' participation in as many areas as possible.

65. The Defendants shall provide sufficient program space so that women prisoners can participate in equal and adequate programs and services as compared to men prisoners. The Defendants shall provide at least two additional trailers at the Annex (with functional sanitary facilities) to allow for additional programming activities. Within 30 days, the Defendants may submit for the Court's consideration an alternative to the 2 ordered trailers.

66. The Defendants shall develop and implement quality assurance programs for monitoring program delivery to ensure the continued provision of equal and adequate programs to women prisoners.

67. The Defendants shall increase the number of staff posted or detailed at the women's unit at CTF and at the Annex to ensure that women prisoners are escorted to educational programs, recreation, employment, and medical care as scheduled. Sufficient staff shall be provided in a manner that does not prevent the programming staff from performing any of their duties.

68. The Defendants shall provide women prisoners at the Annex with a range of academic education programs that is equivalent to the range of academic programs provided to male prisoners at the Minimum Security Facility (Minimum).

69. The Defendants shall provide women prisoners at CTF with a range of academic education programs that is equivalent to the range of academic programs provided to male prisoners at the Occoquan, Central and Medium facilities.

70. Women prisoners at the Annex and CTF shall be provided with the opportunity for full-time (five hours per day, five days per week) basic education to include ABE,

GED, and Special Education classes. The Defendants shall immediately provide two full-time basic education teachers for ABE, GED, and Special Education classes at the Annex.

71. Women prisoners at CTF shall have access to on-site higher education programs which shall include a four-year B.A. and/or B.S. degree program, an A.A. degree program, a certification program, and a precollege program. The bachelor and associate programs shall be offered in a variety of fields, and at a minimum shall each offer three different areas of study leading to a degree. Within 90 days, the Defendants shall at least make the University of the District of Columbia B.A. and A.A. programs available to women prisoners at CTF.

72. The Defendants shall offer women prisoners financial arrangements for these education programs that are the same as those arrangements available to similarly situated male prisoners.

73. The Defendants shall immediately provide women prisoners at CTF with at least 30 hours of access per week to the Atlantic Union computers. Women shall be scheduled to access the computer during educational program time and during free time, including evenings and weekends. Women prisoners shall be provided with an amount of computers sufficient to meet their needs.

74. The Defendants shall immediately process the applications for Atlantic Union in a complete and timely manner. Women shall be provided with all books and course materials before the start of a course. The women shall receive substantive tutorial guidance in the course work from qualified educators.

75. The Defendants shall immediately provide appropriate

substitute teachers or instructors during absences of regular teachers or instructors of more than three working days. The provision of a substitute teacher or instructor shall not result in consolidating two classes into one or increasing the class size.

76. The Defendants shall provide women prisoners at CTF with a range of vocational education programs that is equivalent to the range of vocational education programs provided to male prisoners at the Occoquan, Central and Medium facilities.

77. The Defendants shall provide women prisoners at CTF with two prevocational programs each to be at least six weeks in duration. Prevocational programs include those courses which teach personal development skills, living skills, and/or employment skills such as Employment Techniques, Awareness and Preparation (ETAP) and Lifeskills.

78. The Defendants shall provide women prisoners at CTF with a minimum of four vocational education programs, including the one program currently in place (DocuTech). These programs shall be available to female prisoners of all custody levels. A vocational education program is any program of 12 to 24 months of duration that teaches employable skills and contains both a classroom component and an on-the-job-training component. Two programs shall be operative within 120 days of the entry of this Order.

79. The Defendants shall provide women prisoners at CTF with at least two apprenticeship programs as defined by Department order.

80. All prevocational programs, vocational programs, and apprenticeships added for women prisoners at CTF shall have the potential for providing women with job skills marketable

in the local labor market. An important consideration in the Defendants' selection of programs shall be the wage-earning capacity upon completion of the program.

81. The Defendants shall conduct affirmative outreach to women during the enrollment period for vocational training. This outreach shall entail DCDC staff meeting with women at least one month before the deadline for program enrollment to inform the women that the new programs are available and to offer a full description of the available programs and any applicable criteria for participation.

82. The Defendants shall ensure that all contractual programs used to provide services to women prisoners are compatible with and fulfill the provisions of this Order.

83. The Defendants shall provide women prisoners at the Annex with a range of work opportunities that is equivalent to the range of work opportunities provided to male prisoners at Minimum.

84. The Defendants shall provide women prisoners at CTF with a range of work opportunities that is equivalent to the range of work opportunities provided to male prisoners at the Occoquan, Central and Medium facilities.

85. The Defendants shall employ capable women prisoners on all work details available at the facility where women prisoners are housed. These details shall include maintenance and trades, such as plumbing, carpentry, and electrical.

86. The Defendants shall offer equivalent industrial opportunities by establishing at least two industries at CTF or by transporting women prisoners from CTF to the industries at the Central Facility to perform industrial work. Within 60 days, the Defendants shall submit to the Court plans for the

implementation of an industrial program for CTF women prisoners.

87. The Defendants shall revise the guidelines and practices for work training eligibility within 30 days to take into account the different sentence structure of female offenders and to permit women's maximum participation in work training.

88. The Defendants will immediately provide a work training program to all women prisoners who are eligible under the revised guidelines, including those who are housed at CTF as stated in the CTF Operations Manual.

89. Within 30 days of entry of this Order, the Defendants shall complete and submit work training packets for each woman prisoner eligible for work training and expedite the approval process.

90. The Defendants shall submit required paperwork for work training approval 45 days prior to a woman prisoner's eligibility date in order to complete the process by the date of eligibility. In the event that a woman arrives at the institution with less than 45 days until she is eligible for work training, the Defendants shall expedite the paperwork.

91. The Defendants shall not deny a woman prisoner the opportunity to participate in work training based on her arrival at the Annex or classification to minimum custody status within the previous 90 days or because of her impending eligibility for half-way house placement or parole.

92. The Defendants shall provide adequate staff, including case managers and vocational development specialists, to enable the women prisoners to be informed of their work training eligibility and to complete the necessary paperwork in

the required time frame.

93. The Defendants shall staff a sufficient number of vocational development specialists at the Annex in order to conduct testing, classes and counseling; completes necessary paperwork and develop jobs, including nontraditional employment, and transport women to interviews. The Defendants shall provide the vocational development specialist(s) with an appropriate vehicle for transporting women to job interviews and for performing job development activities.

94. The Defendants shall provide women prisoners at the Annex with recreational opportunities that are equivalent to the recreational opportunities provided to male prisoners at Minimum.

95. The Defendants shall provide women prisoners at CTF with recreational opportunities that are equivalent to the recreational opportunities provided to male prisoners at the Occoquan, Central and Medium facilities.

96. The Defendants shall immediately provide all women prisoners at CTF, including pregnant prisoners subject to medical approval, with recreation seven days per week for at least five hours per day. Women shall have the option of going outside or to indoor recreation facilities during this time period. This recreation schedule shall be effective at CTF within 30 days of this Order.

97. Women shall be given access to the same variety of recreation activities as are available to men, including large group events, intramurals, arts and crafts and drama activities.

98. The Defendants shall immediately open the recreation trailer at the Annex for at least 8 hours per day, 7 days a week. Correctional officers shall open and supervise the

trailer when the recreation specialist is off duty. The recreation specialist shall not be assigned or pulled away from her duties as a recreation specialist for the women at the Annex, except in the case of an emergency.

99. The Defendants shall improve the Annex grounds by adding a basketball court, volleyball pit, and outdoor tables.

100. The Defendants shall provide women prisoners at the Annex with a range of religious programs and services that are equivalent to the range of religious programs provided to male prisoners at Minimum.

101. Within 60 days, the Defendants shall provide chaplaincy services to women prisoners at the Annex for 5 days per week through a staff chaplain, volunteer chaplain, or a combination of chaplain staff members. The chaplain's hours shall include evening hours during the week to accommodate those women working on details, industry, or in the community.

IV. ENVIRONMENTAL HEALTH

102. Within one year, the Defendants shall reduce the population of Annex Dormitories 6 and 7 so that no more than 90 women are housed in the two dormitories combined.

103. Within one year, the Defendants shall repair or replace the roofs of Annex Dormitories 6 and 7 and retain them in a watertight condition.

104. Within 90 days, the Defendants shall repair the Annex dormitories so as to prevent the entry and refuge of vermin and shall conduct a vermin eradication program to eliminate the present infestation of vermin. The Defendants shall thereafter promulgate and follow an effective vermin

eradication program.

105. Within 60 days, the Defendants shall provide each woman prisoner housed in the Annex dormitories at least one vertical locker and one footlocker.

106. Within 30 days, the Defendants shall replace all torn mattresses and pillows at the Annex with clean, untorn, fire-retardant mattresses and pillows. The Defendants shall conduct a regular inspection of all mattresses and pillows and shall, at that time, immediately replace any mattresses that are damaged to a degree that prevents adequate cleaning.

107. The Defendants shall immediately use cart liners or disposable or washable laundry bags to transport laundry at the Annex.

108. For as long as the Annex dormitories are double-bunked, the Defendants shall, within 60 days, provide a minimum of 20 foot candles of prisoner-controlled light to each bunk.

109. Effective immediately, the Defendants shall ensure that all housing units at the Annex are issued a timely, adequate and appropriate amount of cleaning supplies.

110. Within 60 days, the Defendants shall connect the toilets and handsinks in every Annex trailer.

111. The Defendants shall continue to provide sufficient and readily accessible sanitary facilities for women in the industries at the Central Facility.

112. Within 90 days, the Defendants shall improve the ventilation at the Annex dormitories, the print shop and the garment shop so that the quality of air in these areas is

brought up to an acceptable level.

113. Within 90 days, the Defendants shall install a drainage system at the Annex which will prevent hazardous accumulations of water.

114. The Defendants shall promulgate and follow a written preventive maintenance plan for the Annex dormitories, the Annex trailers, and the Annex grounds.

115. Three times every year, the Defendants shall cause the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) to inspect the Annex for compliance with the requirements of environmental sanitation and maintenance and food service delivery (at the main Minimum compound). The first such inspection shall be conducted within 45 days of the date of this Order. Within 30 days of each inspection, the Warden of Minimum shall obtain the DCRA findings. The Warden shall repair, clean, or otherwise remedy an unsanitary, unsound, or unsafe practice or condition identified by DCRA as soon as feasible but in no event later than 30 days following the receipt of the DCRA report.

116. Within 90 days, the Defendants shall hire a qualified air balancing contractor to service the CTF air handling system so that it provides an acceptable level of air quality to all areas of the facility inhabited by prisoners.

117. In the event that the air balancing and other recent repairs to the heating system at CTF fail to maintain a minimum cell temperature of 65°F in every cell, measured at the perimeter wall, the Defendants shall immediately

a. cease housing women in the end cells of each tier;

b. provide each woman prisoner with two extra blan-

kets, two pairs of thermal underwear, and two pairs of wool socks;

c. explore means of insulating or heating the perimeter walls of the cells; and

d. report back to the Court.

118. The Defendants shall develop and implement an effective rodent prevention program.

119. Effective immediately, the Defendants shall ensure that all housing units at CTF are issued a timely, adequate and appropriate amount of cleaning supplies.

120. The Defendants shall use cart liners or disposable or washable laundry bags to transport laundry between CTF and the Jail.

121. Effective immediately, the Defendants at CTF shall monitor the food temperature and delivery times of all foods, including special diet meals, delivered to the satellite kitchen.

122. The Defendants shall promulgate and follow a written preventive maintenance plan for the CTF that includes maintenance of structures, systems, and equipment.

123. The Defendants shall ensure that the correctional officers inspect all plumbing fixtures on each shift, and shall ensure that any plumbing fixture that requires repair will be reported immediately upon discovery, and repaired immediately. The Defendants shall maintain logs demonstrating compliance with this requirement.

124. Three times per year, the Defendants shall cause

the District of Columbia DCRA to conduct inspections of the CTF for compliance with the requirements of environmental sanitation, maintenance and food service delivery. The first such inspection shall be conducted within 45 days of the date of this Order. Within 30 days of each inspection, the Warden of CTF shall obtain the DCRA findings. The Warden shall repair, clean, or otherwise remedy an unsanitary, unsound, or unsafe practice or condition identified by DCRA as soon as feasible but in no event later than 30 days following the receipt of the DCRA report.

V. FIRE SAFETY

125. Within 120 days, the Defendants shall install and maintain a manual fire alarm system and fire detection system which covers all areas used by women prisoners at Minimum, including the Annex dormitories. The fire detection system must include smoke detectors in all sleeping and dayroom areas, and smoke or heat detectors in all other areas. There must be an automatic retransmission of the above systems to a constantly attended location outside of the dormitory buildings. There must also be a control panel to provide emergency power or to send a warning if the system is not operational.

126. The Defendants must repair or replace the fire alarm system in the Administration building, the cafeteria and gymnasium at the Minimum main compound.

127. The Defendants must install a sprinkler system in the Annex dormitories and provide a 20-minute fire-rated enclosure of storage rooms located in both dormitories.

128. The Defendants shall ensure that all bed linens, blankets, and curtains or draperies in the Annex dormitories are of fire-retardant material.

129. Effective immediately, in each Annex dormitory, the Defendants shall conduct fire drills 12 times per year, 4 times per shift, and shall keep written documentation of all such drills.

130. The Defendants shall conduct and document mandatory semi-annual training on fire safety procedures for all correctional officers.

131. Effective immediately, and in accordance with Department Order No. 2920.1A, the Defendants shall:

a. conduct weekly inspections of all buildings and grounds for fire hazards, and document such inspections;

b. conduct quarterly inspections of all fire safety equipment, and document such inspections; and

c. ensure that the Institutional Fire Marshal conducts quarterly inspections of the Facility.

132. Effective immediately, and in accordance with Department Order No. 2920.1A, the District of Columbia Fire Department shall conduct fire safety inspections of the Annex not less frequently than every 12 months. The Warden of Minimum shall obtain the Fire Department's report within 10 days and promptly give a copy to the Plaintiffs' counsel. Thereafter, the Warden shall cause any fire safety deficiencies identified in the Fire Department's report to be remedied within 30 days, or shall provide a report to the Fire Department as to why the deficiency cannot be so remedied and provide a plan to remedy the deficiency within a further period of time not to exceed 90 days.

133. Within 30 days, the Defendants at CTF shall repair the water leakage from rain, particularly in the vicinity

of the high-voltage electrical conduit in the culinary storage room located in the CTF basement.

134. At CTF, the Defendants shall maintain the storage in the culinary storage room in a manner that does not prevent the sprinkler heads from functioning adequately.

135. At CTF, the Defendants shall maintain the sprinkler system and test it quarterly and they shall test the fire pump annually.

136. At CTF, the Defendants shall conduct fire drills 12 times per year, 4 times per shift, and shall keep written documentation of all such drills.

VI. GENERAL

137. This Order shall continue in full force and effect, absent modification by the Court, until the Defendants have complied with all provisions for 5 years.

138. Plaintiffs are awarded the costs of this suit, and reasonable attorneys' fees.

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Plaintiffs,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants.

Civil Action No. 93-2052 (JLG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

August 11, 1995, Decided
August 14, 1995, FILED

MEMORANDUM

I. Introduction

This matter is before the Court on the Defendants' Revised Motion to Stay and/or Modify Judgment. The Court shall deny the Motion to Stay because the Defendants have not

met the necessary standards used to justify such action. The Court, however, will modify certain provisions of the remedial Order of December 13, 1994, as amended ("the Order").

II. Background

This matter came before the Court as a class action in which women prisoners at the Lorton Minimum Security Annex ("Annex"), the Correctional Treatment Facility ("CTF") and the Central Detention Facility ("Jail") sued the Defendants and asked the Court to grant them declaratory and injunctive relief in order to correct alleged violations of the Fifth Amendment, the Eighth Amendment, Title IX and the D.C. Code Ann. § 24-442 (1989).

The Court held a three week trial and found Defendants liable for certain constitutional violations via 42 U.S.C. § 1983 (1994) and statutory violations of D.C. Code Ann. § 24-442 (1989). The Court issued a Memorandum Opinion ("Mem. Op.") and an Order which sought to correct the specific constitutional and statutory violations. The Defendants subsequently filed a Motion to Stay and/or Modify the Order and the Court denied it. The Defendants then sought a Stay of the Order in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals ordered that the case be held in abeyance pending additional proceedings on the Defendants' Motion to Stay in this Court. *Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia*, No. 95-7041 (D.C. Cir. April 4, 1995). The Defendants ultimately filed a Revised Motion to Stay and/or Modify Judgment. After a review of the parties' briefs and oral argument, the Court temporarily stayed 30 paragraphs of the Order and ordered the parties to attempt to negotiate an agreement on those paragraphs. *Women Prisoners of the District of Columbia Dept. of Corrections v. District of Columbia*, 899 F. Supp. 659 (D.D.C.

1995). In commendable fashion, the parties were able to reach agreement on 26 paragraphs. The results are embodied in the Joint Status Motion and Motion Proposing Modifications to the Order for Injunctive and Declaratory Relief ("Joint Motion"). The Motion to Stay as it relates to the four remaining provisions and the Motion to Modify which was based on legal and practical arguments are left for resolution.

In the Joint Motion, the parties informed the Court that the Defendants seek a stay of Paragraphs 20, 43, 79 and 96 of the Order. Although the parties agreed to modify Paragraphs 20 and 43, the Defendants requested a stay due to lack of funds to hire additional medical staff. The four paragraphs, as modified, provide the following:

> 20. The Defendants shall hire within 90 days:
>
> (a) a health educator with appropriate training in obstetrics and gynecology in a half-time position who shall provide clinical and health educational services to the entire female prisoner population; and
>
> (b) an additional nurse practitioner, physician's assistant with special training in obstetrics and gynecology, or nurse midwife to provide clinical services to women prisoners at CTF.
>
> 43. The health educator shall implement, within 60 days from the day that the health educator is hired, an obstetrical and gynecological health education program that satisfies a recognized national medical standard. Educational material should also be made available in the CTF library. The Defendants shall maintain adequate documentation on the program so that it can be evaluated by the Court within 60 days after implementation.

79. The Defendants shall provide women prisoners at CTF with at least one apprenticeship program as defined by Department order.[1/]

96. The Defendants shall immediately provide all women prisoners at CTF, including pregnant prisoners subject to medical approval, with recreation for twenty-five hours per week. Women shall have the option of going outside or to indoor recreation facilities during the time period. This recreation schedule shall be effective at CTF within 15 days of this Order.[2/]

III. Analysis of Motion to Stay

In deciding the Defendants' motion for a stay, the Court must determine whether the Defendants have demonstrated a strong showing that they are likely to prevail on the merits of the appeal and that they will be irreparably injured in the absence of a stay. *WMATA v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977). The Court also must determine whether a stay would substantially harm other parties interested in the proceedings and whether the public interest would be served by a stay. *Id.* When the other three factors strongly favor granting a stay, a Court may

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[1/] The original order mandated two apprenticeship programs. In the Joint Motion, the parties informed the Court that each side would file separate motions detailing their proposals as to these two provisions. The Plaintiffs filed their proposal with the Joint Motion. The Court, as of this date, has received nothing from the Defendants. As more fully stated in Section IV(B) of this Memorandum Opinion, the Court adopts the Plaintiffs' proposed modification of this provision.

[2/] The original order mandated thirty-five hours of recreation per week. As more fully stated in Section IV(B) of this Memorandum Opinion, the Court adopts the Plaintiffs' proposed modification of this provision.

exercise its discretion to grant a stay "if the movant has made a substantial case on the merits." *Id.* Essentially, the Court may properly stay its own order when it has "ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Id.* at 844-45.

A. Merits of the Appeal

1. *D.C. Code Ann. § 24-442 (1989)*

Paragraphs 20 and 43 of the Order rest on the Court's finding of a lack of adequate obstetrical and gynecological care at CTF in violation of D.C. Code Ann. § 24-442 (1989). The statute provides, in pertinent part:

> [The] Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to [facilities under its jurisdiction].

D.C. Code Ann. § 24-442 (1989). This statute "implicitly recognizes the common law rule which imposed upon prison authorities, a duty to exercise reasonable care under the circumstances in the protection and safekeeping of prisoners." *Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988). Nothing in the statute explicitly curtails the equity jurisdiction conferred on the Court by D.C. Code Ann. § 11-921(a) (1995).[3/] The District of Columbia Court of Appeals has "always construed this grant of jurisdiction broadly . . . [and] has upheld [the Superior Court's] exercise of equitable

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3/ When exercising pendent jurisdiction over a state law claim, the Court has the same equitable powers as the state court. *West Allis Memorial Hospital, Inc. v. Bowen*, 852 F.2d 251, 257 (7th Cir. 1988).

jurisdiction in a variety of contexts, even when statutes did not explicitly provide access to the Superior Court." *Hessey v. Burden*, 615 A.2d 562, 571 (D.C. 1992) (citations omitted).

The Defendants argue that the statute merely extends the common law of torts to prisons and does not permit equitable relief to prevent future torts. Implicit in the argument is the view that the common law of torts forbids injunctive relief to prevent future torts. It is well-settled, however, that the common law recognizes that an important form of remedy for a tort is an injunction, granted before any damage occurs. *Berrien v. Pollitzer*, 83 U.S. App. D.C. 23, 165 F.2d 21, 22 (D.C. Cir. 1947) ("No one can seriously contend that money is an adequate remedy for all sorts of personal wrongs. Clearly 'injunctions and similar flexible remedies of equity are much better suited than a speculative action for damages to protect [personal] interests . . . .'"); *see also Prosser and Keeton on The Law of Torts*, Ch. 1, § 1 p. 2 (5th Ed. 1984).

In negligence actions where irreparable injury is threatened, a court may act by injunction to prevent harm before it occurs. *Prosser and Keeton on The Law of Torts*, Ch. 5, § 30 p. 165 n.8 (5th Ed. 1984). The availability of an injunction against a threatened tort depends upon various factors including "the relative adequacy to the plaintiff of an injunction and of the other remedies, plaintiff's laches or unclean hands, the relative hardship likely to result to defendant if an injunction should be granted and to plaintiff if it should be denied, the interests of third persons and of the public and the practicability of framing and enforcing the order of judgment." Restatement (Second) of Torts, Ch. 48 § 933(1) p. 559 and Comment a. on Subsection (1) p. 560 (1979). The threatened tort must be of sufficient seriousness and imminence to justify coercive relief. Restatement (Second) of Torts, Ch. 48 § 933 p. 561 comment b. on Subsection (1) (1979). A common method of proving a threat of a future tort is by proving a past tort under

conditions that render its repetition or continuance probable. *Id.* It is not necessary, however, to prove a past wrong. *Id.*

The Defendants' failure to meet the standard for obstetrical and gynecological care is the proximate cause of past injuries and it is reasonably foreseeable that their actions or inactions will lead to future injuries to the Plaintiffs. The Defendants' failure appropriately to educate women prisoners results in their refusal of medical help. Inadequate examinations and follow-up treatment permit cervical and breast cancer, opportunistic infections in AIDS patients, sterility as a result of chlamydia and gonorrhea, peritonitis from gonorrhea, and aortic aneurysms, dementia, psychosis or death from syphilis. Plainly, an award of damages is no remedy for these medical problems. Furthermore, women prisoners do not have the option of finding other doctors. Only equitable relief will provide an adequate remedy.

The Defendants argue that the Court should refrain from using its equitable powers in the absence of any guidance from the District of Columbia Court of Appeals interpreting § 24-442. This Circuit, however, has affirmed an order of equitable relief in the absence of any District of Columbia decisional law. *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 241 U.S. App. D.C. 83, 746 F.2d 816, 828 n.18 (D.C. Cir. 1984) (stating, "Since no District of Columbia decisional law is on point here, we must make a predictive judgment about D.C. law.")

The Defendants argue that § 24-442 should be interpreted like 18 U.S.C. § 4042 (1985) which provides federal prisoners with a tort remedy in damages but not equitable relief. Federal prisoners, however, may not sue for injunctive relief because such a remedy is precluded by the doctrine of sovereign immunity and the Federal Tort Claims Act does not provide a waiver of sovereign immunity for equitable relief. Federal

prisoners may maintain an action in tort for money damages because the Federal Tort Claims Act, 28 U.S.C. § 2674 (1994) carves out an exception to the doctrine. Section 18 U.S.C. § 4042 (1985) simply establishes the Bureau of Prisons' duty of care.[4/] The District of Columbia, lacking sovereign immunity, does not possess a similar shield to protect it from claims for injunctive relief. *See Wade v. District of Columbia*, 310 A.2d 857, 861 (D.C. 1973).

The Defendants also argue that the Court should not have exercised supplemental jurisdiction over the § 24-442 claim pursuant to 28 U.S.C. § 1367 (1993). That statute provides, in pertinent part:

> (a) [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> > (1) the claim raises a novel or complex issue of State law,

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[4/] The Defendants claim that District of Columbia decisions interpreting § 24-442 have relied on federal interpretations of 18 U.S.C. § 4042 (1985). Local decisions comparing 18 U.S.C. § 4042 (1985) with § 24-442, however, have done nothing more than to observe that both statutes establish a similar standard of care for prison officials in their respective jurisdictions. *See Matthews v. District of Columbia*, 387 A.2d 731, 734 (D.C. Cir. 1978); *Ross v. United States*, 641 F. Supp. 368, 371 (D.D.C. 1986).

> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction,[5/] or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The claims under § 24-442 are so related to claims in the action within the Court's original jurisdiction that they form part of the same case or controversy. A Court has the authority to reach a state law claim when a non-frivolous claim arising under federal law and one arising under state law emerge from a common nucleus of operative fact. *Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988) (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725, 16 L.Ed.2d 218, 86 S. Ct. 1130 (1966)). The justification for such an exercise of jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants." *United Mine Workers of America v. Gibbs*, 383 U.S. at 726.

Although the Court did not address the issue of gynecological care under the Eighth Amendment, the Court holds that the constitutional claim is not "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536, 39 L.Ed.2d 577, 94 S. Ct. 1372 (1974).[6/] The record is replete with instances of profound

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[5/] The Court did not reach the constitutional claim.

[6/] The Defendants are disturbed that the Court refrained from deciding the constitutional question in favor of applying the District of Columbia

(continued...)

suffering caused by inadequate obstetrical and gynecological care at CTF. This factual situation is a far cry from one in which a state cause of action is bootstrapped on to a frivolous constitutional claim.

The statute conferring supplemental jurisdiction is permissive in that it provides that a district court "may" decline to exercise supplemental jurisdiction over a state law claim for the enumerated reasons. The Court does not find any reason under 28 U.S.C. § 1367(c)(1)-(4) (1993) to relinquish jurisdiction over the § 24-442 claims.

The claim does not raise a novel or complex issue of District of Columbia law. The standard of care in the statute has been clarified so as to preclude any ambiguity. *See District of Columbia v. Mitchell*, 533 A.2d 629, 648 (D.C. App. 1987) (holding physicians owe same standard of care to prisoners as physicians owe to private patients generally). The exercise of injunctive relief is explicitly authorized by D.C. Code Ann. § 11-921(a) (1995) and is an unexceptional feature of common law.

The claim does not substantially predominate over the constitutional or Title IX claims "whether in terms of proof, or the scope of the issues raised, or of the comprehensiveness of the remedy sought." *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726, 16 L.Ed.2d 218, 86 S. Ct. 1130 (1966). Furthermore, there are no other compelling reasons

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[6](...continued)
Code. The Supreme Court, however, in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117, 79 L.Ed.2d 67, 104 S. Ct. 900 (1984) provided the following guidance: "[A] federal court may resolve a case solely on the basis of a pendent state-law claim . . . [and] the court usually should do so in order to avoid federal constitutional questions . . . ."

for declining jurisdiction.

The Defendants argue that application of § 24-442 is barred by the 11th Amendment to the United States Constitution.[7/] The Defendants support this argument with the case of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 79 L.Ed.2d 67, 104 S. Ct. 900 (1984), in which the Supreme Court held that the Eleventh Amendment prohibits federal courts from granting relief against state officials on the basis of state law. The District of Columbia, however, is not a state for the purposes of the Eleventh Amendment. *Committee of Blind Vendors v. District of Columbia*, 695 F. Supp. 1234, 1241 n.6 (D.D.C. 1988); *See Morris v. WMATA*, 781 F.2d 218, 228 (D.C. Cir. 1986) ("Had Maryland and Virginia created WMATA without the participation of the District of Columbia, we would conclude that WMATA enjoys eleventh amendment immunity as an instrumentality of the state.") *Cf. Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S. Ct. 693 (1954) (District of Columbia not a "state" under the Fourteenth Amendment). It is well-settled that the District of Columbia is a municipality. *Jones v. District of Columbia*, 116 U.S. App. D.C. 301, 323 F.2d 306, 309 (D.C. Cir. 1963); *La Forest v. Board of Commissioners*, 92 F.2d 547, 548 (D.C. Cir. 1937). The Eleventh Amendment does not protect municipalities. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70, 105 L.Ed. 2d 45, 109 S. Ct. 2304 (1989).

7/ The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The District of Columbia, therefore has no immunities under the Eleventh Amendment.

2. *Title IX*[8/]

Paragraphs 79 and 96 of the Order rest on the Court's finding of an inequality of programs offered at CTF in violation of Title IX and its implementing regulations. The Court, therefore, must examine these laws.

Title IX of the Education Amendments of 1972 provides, in relevant part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1990).

Under Title IX, "state prisons receiving federal funds are required . . . to make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality." *Jeldness v. Pearce*, 30 F.3d 1220, 1229 (9th Cir. 1994).

The Defendants argue that the Court mistakenly applied Title IX to prison industries, prison recreational activities, prison work details and work training programs. The Court, however, is required to accord Title IX "a sweep as broad as its language," *North Haven Board of Ed. v. Bell*, 456 U.S.

8/ The Defendant argues that the men and women prisoners are not "similarly situated" for the purposes of Title IX. Nothing in the record prompts the Court to reverse itself on this issue.

512, 521, 72 L.Ed.2d 299, 102 S. Ct. 1912 (1982), and therefore, it holds that Title IX reaches industries, recreation, work details and work training.

During congressional debates on Title IX, Senator Bayh, who introduced the legislation, plainly announced that the proposed law was meant to expand employment opportunities for women:

> It is . . . an important first step in the effort to provide for the women of America something that is rightfully theirs - an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have *a fair chance to secure the jobs of their choice* with equal pay for equal work.

118 Cong. Rec. 5808 (1972) (Emphasis added). *See Northhaven Board of Education v. Bell*, 456 U.S. at 526-27 ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.")

Title IX's implementing regulations specifically prohibit sexual discrimination in the areas presently at issue. A recipient of federal funds may not discriminate on the basis of sex in the following education programs or activities: industrial, physical education,[9] vocational,[10] technical. 34

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[9] The regulations also cover intramural athletics. 34 C.F.R. § 106.41(a) (1994).

[10] "Vocational education is preparation for the pursuit of a technical, skilled, or semiskilled occupation or trade, or study in a technical field, whether or not the school or institution offers certificates, diplomas, or (continued...)

C.F.R. § 106.34 (1994). In the area of employment, recipients are prohibited from sexually discriminating when they assist another organization or person in making outside employment available. 34 C.F.R. § 106.38(a) (1994). Use of the word "outside" indicates a clear intent to prevent discrimination in ordinary employment as opposed to the more traditional academic or work training programs. Furthermore, the regulations prevent the recipient from discriminating when they hire for their own needs. 34 C.F.R. § 106.38(b) (1994). The "outside employment" distinction is important because it destroys the inflexible partition between work and study which the Defendants' interpretation of Title IX creates.[11/]

Defendants also ignore the very practical interconnections between work and study at the institutions. In the Court's Memorandum Opinion of December 13, 1994 it found that the completion of academic, vocational, apprenticeship and higher education programs qualifies women prisoners for an increased industrial wage. (R. 10A-48 (Morning Session).) (Memorandum Opinion ("Mem. Op.") at 47.) Work opportunities and academic performance are woven together as in a more traditional work-study context.

[10/](...continued)
degrees and whether or not it offers fulltime study." 34 C.F.R. § 106.2(n) (1994).

[11/] Gender discrimination in vocational education, job placement and apprentice training programs is also prohibited by 34 C.F.R. Pt. 100, App. B, VII(A) & VII(B) (1994) which is an implementing regulation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994).

3. *The Fifth Amendment and Equal Protection*

At trial, the Plaintiffs challenged programs at CTF and the Annex on Equal Protection grounds. The Court decided not to reach that issue because the remedial devices in Title IX sufficiently cover discrimination in educational programs. A decision on the constitutional question was, therefore, not absolutely essential to the disposition of the case. (Mem. Op. at 105.) This issue now comes before the Court in a different posture. In deciding a motion to stay, the Court must decide whether it has rendered a decision on "an admittedly difficult legal question." *See WMATA v. Holiday Tours, Inc.*, 559 F.2d at 844-45. Since the issue raised under Title IX is one of first impression in this Circuit, the Court holds that it should proceed to the Equal Protection claim.[12/]

The fundamental purpose of the Equal Protection Clause is to compel the government to treat equally all people who are similarly situated.[13/] *Cleburne v. Cleburne Living*

[12/] Though the "likelihood of success on the merits" analysis may suggest to the parties that the Court's analysis here is merely predictive, the Court's Equal Protection analysis constitutes a substantive modification of the Memorandum Opinion and Order issued by the Court on December 13, 1994. This works no prejudice to either side as this issue has been fully briefed by the parties and, in any event, the Plaintiffs are entitled to raise their Equal Protection claims in the Court of Appeals. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 25 L.Ed.2d 491, 90 S. Ct. 1153 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.")

[13/] The Court will compare prisoners who are similarly situated by virtue of their similar custody levels, sentence structures and purposes of incarceration. The Court holds that women prisoners at the Annex are similarly situated to the male prisoners at Minimum and that women

(continued...)

Center, 473 U.S. 432, 439, 87 L.Ed.2d 313, 105 S. Ct. 3249 (1985). Equal protection principles apply to federal action through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499, 98 L.Ed. 884, 74 S. Ct. 693 (1954). Government policies that seek to distinguish between males and females are subject to scrutiny under the Equal Protection Clause, *Reed v. Reed*, 404 U.S. 71, 75, 30 L.Ed.2d 225, 92 S. Ct. 251 (1971), and anyone defending such a policy must provide an "exceedingly persuasive justification" for it. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 73 L.Ed.2d 1090, 102 S. Ct. 3331 (1982). Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197, 50 L.Ed.2d 397, 97 S. Ct. 451 (1976). The Supreme Court has rejected administrative ease and convenience as a justification for gender-based classifications. *Id.* at 198.

In the case of *Pitts v. Thornburgh*, 275 U.S. App. D.C. 332, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit Court of Appeals confronted an equal protection challenge by female prisoners. In *Pitts*, the inmates alleged that the District of Columbia's policy of incarcerating long-term female offenders at distant federal facilities violated the Equal Protection Clause. *Id.* at 1451-52. The Court of Appeals applied the heightened scrutiny standard despite the Supreme Court's use of a "reasonableness" standard when reviewing prison regulations in *Turner v. Safley*, 482 U.S. 78, 96 L.Ed.2d 64, 107 S. Ct. 2254 (1987).

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[13]/(...continued)
prisoners at CTF are similarly situated to the male prisoners at Occoquan, Central and Medium facilities. (See Mem. Op. at 95-99.)

The *Pitts* court offered two reasons for its application of heightened scrutiny. The Court stated that *Turner* "applies to cases involving regulations that govern day-to-day operation of prisons and that restrict the exercise of prisoners' individual rights within prison" whereas *Pitts* involved "general budgetary and policy choices made over decades in the give and take of city politics." *Pitts v. Thornburgh*, 866 F.2d at 1453-54.

The Court also stated that *Pitts* involved "important concerns that the Supreme Court has clearly held call for stepped-up scrutiny" under the Fifth Amendment. *Id.* at 1454. Equal protection claims are distinct from the personal rights challenges in *Turner* because the former is a "demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties." *Id.* at 1455.

The Defendants argue that the differences in treatment between men and women in the areas of recreation, industries and work details, "are largely attributable to the differences in the physical structures in which men and women convicts are incarcerated and in the relative proportion of men and women placing demands on limited space, personnel, and other resources available to the Department of Corrections." (Defs. Reply at 12.) The Defendants also argue that CTF "had been operating for only a short period, and [was] just getting off the ground, when this case was filed, while the facilities the plaintiffs have used for comparison had been in operation for much longer periods." (*Id.*)

a. The Annex

The Court finds that the women at the Annex are similarly situated to the men of the Minimum Facility by virtue of

their similar custody levels, sentence structures and purposes of incarceration. (*See* Mem. Op. at 95-99.)

The Defendants provide women prisoners at the Annex with an opportunity for work details, recreation and work training that is not equal to the opportunities provided to similarly situated men.[14/] The decision to provide women prisoners with less opportunity in these areas must serve important governmental objectives and must be substantially related to achievement of those objectives to withstand invalidation.

Women prisoners at the Annex are employed as maintenance workers, housekeepers, receptionists, clerks and librarians, but do not perform skilled chores like carpentry and plumbing. (Mem. Op. at 49.) There is no justifiable reason why women cannot perform the more skilled, less traditional chores within their own facility as similarly situated men may do in their facilities. (*Id.* at 49-50.)

In the area of work training, the unequal participation of women is due to the Defendants' inability to complete paperwork, insufficient transportation and failure adequately to publicize those opportunities which are available. (*Id.* at 51-52.) There is no important government objective being served.

Recreational opportunity for women at the Annex is not equal due to inferior facilities and limited access to the athletic facilities at the Minimum Facility main compound. (Mem.

[14/] The Court found no inequality under Title IX in the area of vocational training, apprenticeships and industries. (Mem. Op. at 50-51.) The Court finds no violation of the Equal Protection Clause in these areas either.

Op. at 52-53.) To justify the inequality by pointing to the "differences in the physical structures" merely begs the question. Similarly, relying on the "proportion of men and women" does not address the differences in the quality of what the women are offered. The limited resource argument does not explain the unequal distribution of the minimal resources that are available. In sum, the Defendants have failed to raise any important governmental objectives to justify the differences in treatment between men and women prisoners.

The Court holds that the Defendants are liable under 42 U.S.C. § 1983 (1994) for not providing equal opportunities in the areas of recreation, work details and work training at the Annex because this inequality results from the implementation of a policy decision of the Department of Corrections to provide unequal opportunity in these areas. *See Monell v. Department of Social Services*, 436 U.S. 658, 690, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978).

b. CTF

The Court finds that the women at CTF are similarly situated to the men of Central, Medium and Occoquan by virtue of their similar custody levels, sentence structures and purposes of incarceration. (*See* Mem. Op. at 95-99.)

The Defendants provide women prisoners at CTF with an opportunity for recreation, industries and work details that is not equal to the opportunity provided to similarly situated men.[15/] The decision to provide women prisoners with less opportunity in these areas must, therefore, serve important governmental objectives and must be substantially related to

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15/ Work training is not an issue at this facility.

achievement of those objectives.

The main governmental objective behind placing women prisoners at CTF was to save money for the District of Columbia. (Mem. Op. at 27-28.) The Defendants argue that CTF was still adjusting to the transfer of women prisoners to the facility when the Plaintiffs filed this case and CTF is being compared to facilities that were in full operation for a long time. Many of the problems at CTF, however, stem from the Defendants' own failure to plan, develop and implement either programs or resources for women prisoners. (Mem. Op. at 47.) The continuing programmatic inequalities are not substantially related to the objective of saving money.

In the area of work details, CTF offers positions in maintenance, culinary, clerical, education, environmental, intake, landscape, offices, quick copy, religion and supply management. (Mem. Op. at 59.) Central offers 25 work details which include those found at CTF, but also give men the opportunity to practice trades like plumbing, carpentry, bricklaying, mechanics, painting, welding, air conditioning, and masonry. (*Id.*) Medium offers the typical support jobs but again offers some trades in painting, plumbing, and electrical work. (*Id.*) Occoquan's offerings include barbering, carpentry, electrical work, heating, painting and plumbing. (*Id.*)

There is no important governmental objective being served by precluding women from performing some of the skilled details that men are allowed to perform at their respective institutions. Though the physical structures inhabited by the men are different from CTF, there exists nonetheless a need for the performance of skilled details at CTF. Trades like plumbing, carpentry, bricklaying, electrical work, painting, welding, air conditioning, heating and masonry are skills needed to keep almost any building in

repair. Though CTF is a relatively new building, its physical problems are well documented. (*See* Mem. Op. at 27-33, 39-40.) The larger number of men prisoners and the lack of resources do not provide reasons for the lack of opportunity for women at CTF.

In the area of industries, Central offers ten, Medium offers two, Occoquan offers one and CTF offers none. (Mem. Op. at 60.) The Defendants argue that the structure of CTF prevents the establishment of an industry for women. The Defendants' own expert penologist, however, testified that the Defendants should create an industry at CTF. (Mem. Op. at 60.) Such testimony indicates that equality is achievable. Its absence, therefore, is not acceptable.

The amount of recreation at CTF is severely limited by the physical structure of the facility. The structure cannot, however, account for the utterly one-sided opportunities for recreation. Plaintiffs' expert penologist likened the approximately one hour of recreation time a day to the prison disciplinary measure of "segregation". (Mem. Op. at 61.) The smallest allocation of recreation for men allows for two to four hours a day. (Mem. Op. at 62.) Such a contrast clearly violates the principle of equal protection.

The Defendants are liable under 42 U.S.C. § 1983 (1994) for the unequal provision of recreation, industries and work details at CTF because the situation is a direct result of a policy decision of the Department of Corrections. *See Monell v. Department of Social Services*, 436 U.S. 658, 690, 56 L.Ed.2d 611, 98 S. Ct. 2018 (1978). They are also liable because this deprivation is caused by a governmental 'custom' which has not received formal approval through the Department of Corrections decisionmaking channels. *See id.* at 691.

4. *Remedies*

The Defendants challenge both the statutory and constitutional bases of the four provisions and the Court's power to take those remedial measures. When a court finds prison conditions which violate the law, it has a duty to remedy the offending conditions and, as this Circuit has cautioned, mandate "specific corrections of specific problems." *Inmates of Occoquan v. Barry*, 269 U.S. App. D.C. 210, 844 F.2d 828, 841 (D.C. Cir. 1988). Courts are to be guided by certain limiting principles. First, "once a right is established the remedy chosen must be tailored to fit the violation," with the scope of the remedy determined by the nature and extent of the violation. *Id.* Courts must identify conditions and order these conditions remedied. *Id.* at 842. If, after ordering specific changes, local authorities are "found wanting", then district courts are empowered to make even broader or "sweeping remedial" changes. *Id.* Second, the remedy chosen must seek to place victims of unlawful conduct in "the position they would have occupied in the absence of such conduct." *Id.* at 841 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280, 53 L.Ed.2d 745, 97 S. Ct. 2749 (1977). Third, district courts must consider the interests of local authorities in managing their own affairs. *Id.*

The essence of the Defendants' remedies argument is that the Order in this case go beyond what is necessary to cure the violative conditions.[16/] The Court holds that the remedies faithfully follow the limiting principles of *Occoquan v. Barry*.

[16/] The Defendants also claims that the remedies are "unrealistic and excessively expensive." (Defs. Cor. Mem. P & A at 6.) The Court cannot discern the legal ground for this argument but assumes it is a restatement of their "overbreadth" argument.

Paragraph 20 (a) seeks to remedy specifically the grossly inadequate health education at CTF. (Mem. Op. at 18-19.) The Order simply mandates a health educator with appropriate training in obstetrics and gynecology in a half-time position to provide clinical and health educational services.

Paragraph 20(b) seeks to remedy specifically the inadequate staffing which results in inadequate obstetrical and gynecological care. (Mem. Op. at 25.) The Order gives the Defendants the choice of adding a nurse practitioner, physician's assistant with special training in obstetrics and gynecology, or nurse midwife to provide clinical services.

Paragraph 43's implementation of an obstetrical and gynecological health education program, like Paragraph 20 specifically addresses the problem of inadequate education. Provision of educational material addresses the absence of any educational materials for women prisoners at CTF. (Mem. Op. at 18-19.) Maintenance of records allows the parties to prove compliance or noncompliance with the Paragraph.

Given the nature and extent of problems with obstetrical and gynecological care at CTF, the Court holds that these remedies are sufficiently tailored to meet specific existing problems. In addition, these paragraphs of the Order place women prisoners at CTF in a position they would have occupied in the absence of such neglect. They will now be educated and treated.

As to the interests of the District of Columbia in managing its own affairs, Paragraphs 20 and 43 simply conform to the policies of the Department of Corrections. Defendants' policy on health promotion and disease prevention states: "Health Services will provide health education and training in self-care skills to all inmates . . . ." (Mem. Op. at 18.) Furthermore, "it is the policy of Health Services to provide

clinically appropriate periodic health examinations and follow-up care to inmates under the [DCDC]." (Mem. Op. at 14.)

Paragraphs 79 and 96 specifically address two blatant inequalities at CTF. There are no apprenticeships at CTF equal to those offered to similarly situated male prisoners. (Mem. Op. at 59.) Paragraph 79 does nothing more than order the Defendants to remedy this situation and allows them to do so "as defined by Department order."

Similarly, Paragraph 96 is specifically tailored to remedy the unequal provision of recreational opportunities at CTF. (Mem. Op. 60-62.) The twenty-five hours of recreation time per week given to women is less than the fifteen hours per day given to males at Central or the all day recreation of males at Medium or the daily seven hours of recreation at Occoquan. (Mem. Op. 61.) The option to remain indoors or go outdoors is exactly the option men exercise at the similarly situated facilities. Furthermore, Paragraphs 79 and 96, at the very least, place women prisoners in the position they would have occupied in the absence of such inequality.

The Court has been cognizant of the Defendants' interest in managing their own affairs. Paragraph 79 does not offer any specifics as to the type of apprenticeship program to be offered. It simply orders the Defendants to establish one. Paragraph 96 does not set a detailed schedule for recreation but instead provides a weekly amount. The Defendants still retain much latitude within the broad outlines of these two Paragraphs.

In summary, the Court holds that the four paragraphs challenged by the Defendants on "overbreadth" grounds are consistent with the limiting principles which district courts in this Circuit must apply when devising remedies for unlawful

prison conditions.

B. Irreparable Injury to the Defendants

The Defendants justify their Motion for a stay by arguing that the District of Columbia has been declared insolvent by the General Accounting Office and the Order diverts funds to costly improvements. Defendants claim that they cannot afford to hire the two additional staff members required by Paragraph 20 or to start the health education program under Paragraph 43. The Defendants did not make this argument for Paragraph 79 or 96, but even so, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925; 104 U.S. App. D.C. 106 (D.C. Cir. 1958). Though some of this money might be unrecoverable, "a party moving for a stay is required to demonstrate that the injury claimed is both certain and great." *Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 976 (D.C. Cir. 1985). The Court holds that the potential injury from these two provisions does not rise to that level.

C. Substantial Harm to Other Interested Parties

"As with irreparable harm to the movant, [the Court] test[s] these harms for substantiality, likelihood of occurrence and adequacy of proof." *Id.* at 977. The provision of health care and education is exceedingly important for people in a high risk health category such as Defendants. Failure to educate and treat obstetrical and gynecological problems will lead to very serious health problems for some members of the Plaintiff class.

At trial the Plaintiffs' expert penologist testified that, in the opinion of the Department of Corrections employees with

whom she spoke, the "inability to have a job" was the most common reason for the return of women prisoners to jail. The apprenticeship program cannot be postponed while women prisoners at CTF move closer to their release dates.

Recreation assumes a greater dimension within the context of a controlled movement facility like CTF. The Plaintiffs' expert likened the limited recreation at CTF to punitive segregation which is a form of injury that a prison may legitimately use against prisoners. At CTF, however, such a restriction is the norm. It is a daily substantial injury.

As with the Defendants' funds, the Plaintiffs' potential loss of recreation, health and vocational training are unrecoverable. The Court holds that upon weighing the competing harms, the balance swings toward a denial of the Motion to Stay.

D. The Public Interest

The Court holds that whatever interest the public has in the Order favors a denial of a Motion to Stay. The interest in saving the public money needed for the four provisions is outweighed by the public interest in having women prisoners leave jail reasonably healthy and with the capacity to hold productive jobs instead of returning to jail for a publicly financed incarceration.

IV. Analysis of Motion to Modify

In addition to the Motion to Stay, the Defendants have moved the Court to modify its Order. As a preliminary matter, the Court will adopt the modifications proposed by the parties in the Joint Motion, with the exception of Paragraphs 20 and 40. Defendants' arguments for modification generally are premised on legal and practical grounds. The Court will

consider each category in turn.

A. Legal Bases for Modification

The Court is satisfied that its legal analysis of the Eighth Amendment, the Fifth Amendment, Title IX and the D.C. Code adequately support the remedial order issued in this case with the exception of child visitation and child placement issues. The Court will address this issue first. In addition, the Court will review the challenges to the Order under the limiting principles for remedies announced in *Inmates of Occoquan v. Barry*, 269 U.S. App. D.C. 210, 844 F.2d 828 (D.C. Cir. 1988).[17/]

1. *Child Visitation and Child Placement Counseling*

In its Memorandum Opinion, the Court held that the lack of child visitation and inadequate child placement counseling at CTF combined to form an Eighth Amendment violation. (Mem. Op. at 78-80.) Upon reconsideration of the legal issue, the Court holds that issues involving prisoner visitation rights are more appropriately reviewed under the Due Process Clause. On the issue of prisoner contact visits, the Supreme Court has held that the Constitution does not require that prisoners be allowed contact visits "when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility."[18/] *Block v. Rutherford*, 468 U.S. 576, 589, 82

17/ The Court will review those challenges outlined in Section D of the Defendants' Revised Motion to Stay and/or Modify the Judgment and the challenges in the Defendants' Supplement to the Corrected Motion.

18/ In a case involving a woman prisoner's right to breast-feed her infant, the Fifth Circuit analyzed the issue as one implicating the right of privacy (continued...)

L.Ed.2d 438, 104 S. Ct. 3227 (1984).

Attached to the Revised Motion to Stay and/or Modify Judgment, the Defendants attached the Corrected Declaration of Margaret Moore, Director, D.C. Department of Corrections. Ms. Moore's revised declaration contains additional information not previously provided to the Court. In her revised Declaration, the Director explains that a program allowing for women prisoners to routinely visit their children at D.C. General Hospital would create significant security risks such as escapes, assaults and the passing of contraband. (Moore Dec. at 11-12.) Based on Ms. Moore's evaluation of the security risks, the Court will vacate that portion of the Memorandum Opinion holding that the lack of child visitation violates the Eighth Amendment. The Court will also vacate Paragraphs 39 and 40 of the Order.

Without child visitation as an Eighth Amendment concern, the Court holds that the lack of child placement counseling does not by itself rise to the level of an Eighth Amendment violation.[19/] Though the Court regards such matters as exceedingly important, it does not believe that lack of child placement counseling is a deprivation which denies the minimal civilized measure of life's necessities. *See Wilson v.*

[18/](...continued)
which includes the right to make personal decisions relating to child rearing without governmental interference. *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986) (quoting *Carey v. Population Services International*, 431 U.S. 678, 52 L.Ed.2d 675, 97 S. Ct. 2010 (1977)). The court ultimately denied her request and held that her right to breast-feed her child was inconsistent with the legitimate goals and policies of the penal system. *Id.* at 718.

[19/] The Court also holds that it does not contravene D.C. Code Ann. § 24-442 (1989).

Seiter, 501 U.S. 294, 298, 115 L.Ed.2d 271, 111 S. Ct. 2321 (1991). The Court, therefore, vacates Paragraphs 41 and 42 of the Order.

2. *Remedies*

As to the remedies for Title IX violations, the Defendants argue that the inequalities can be cured by a redistribution of existing resources and programs and that they should be given the option of redistributing these resources. The remedies which correct Title IX and Equal Protection violations rest on evidence the Court reviewed at trial. The Court realizes that the situation with programs at all of the Defendants' facilities is fluid. The Court does not intend the Order to preclude a redistribution of resources, as long as it can be accomplished within the bounds of the Order and the court orders and consent decrees which control other institutions under the Defendants' control. Nonetheless, the Court does not have before it any evidence that such a redistribution has occurred. If the Defendants devise a plan which offers the Plaintiffs fewer programs than what is contained in the Order but which is also not in violation of Title IX or the Equal Protection Clause, the Defendants may present such evidence to the Court and seek a modification of the Order.

The Defendants' Motion to Stay and/or Modify identifies individual provisions of the Order which they say are not justified. The Court will consider each objection that contains a specific legal argument.[20/]

[20/] The Defendants objections to Paragraph 24, 25, 26, 27, 28, 30, 31, 32, 36, 37, 44, 45, 49, 50, 58, 84, 85 are essentially disagreements with the Court's Findings of Fact. The Defendants do not present evidence which would cause the Court to amend its Findings of Fact.

Paragraph 7, *inter alia*, prohibits the Defendants from retaliating against a woman prisoner who reports sexual harassment. This provision specifically addresses problems of retaliation found by the Court at trial. The evidence demonstrated that officers threatened women not to report the incidents of assaults. (Mem. Op. at 4.) Women prisoners were also placed in non-voluntary protective custody after reporting these events. (*Id.*) This remedy does not prevent the Defendants from legitimately taking punitive action against women prisoners for an infraction. It simply prevents then from using disciplinary measures to cover up sexual harassment.

Paragraph 10 allows women prisoners to submit Inmate Grievance Procedure forms ("IGP's") or complaints orally or in writing to a DCDC employee who must submit it to the monitor and Warden within 24 hours. This provision specifically addresses problems encountered by illiterate prisoners and problems with inconsistent reporting practices of the Defendants. (Mem. Op. at 6-7.)

The parties have reached an agreement as to the wording of Paragraph 20. The Court, however, will amend Paragraph 20(a) to require the ordered health educator to provide the ordered services to "the entire female prisoner population at CTF." Obstetrical and gynecological care of women prisoners at the Annex is controlled by the consent decree in *Inmates of Three Lorton Facilities v. District of Columbia*, No. 92-1208 (D.D.C.) and such care at the Jail is controlled by *Campbell v. McGruder*, 1993 U.S. Dist. LEXIS 5377, No. 1462-71 (D.D.C.).

Paragraph 21 requires the Defendants to maintain their current regularly scheduled hours. This specifically addresses problems with understaffing, (Mem. Op. at 25), and overall inadequate OB/GYN care. (Mem. Op. at 15-18.) The

Defendants argue that since a clinic already exists this provision is unjustified. In The Special Officer's Report on Compliance with the December 13, 1994 Order, as Amended ("Special Officer's Report") filed on May 10, 1995, the Special Officer informed the Court that, although Paragraph 21 would not take effect for another month, evidence indicated that the clinic operated sporadically between January 1995 and April 1995. (Sp. Off. Rpt. at 20.) The Court holds that this provision corrects a specific problem and it is not an unwarranted intrusion into the Defendants' affairs inasmuch as it merely requires them to maintain the hours of their own clinic.

Paragraph 22 of the Order requires the Defendants to establish a prenatal clinic at CTF. This provision specifically seeks to remedy the inadequate prenatal care given to women prisoners at CTF. (Mem. Op. at 19-22.) Defendants claim that the needs of women prisoners are met by using the OB/GYN clinic at CTF. The Special Officer's Report contradicts this position. (Sp. Off. Rpt. at 21.) The Court, therefore, will not modify Paragraph 22.

B. Practical Basis for Modification

Paragraph 79 mandated two apprenticeship programs for CTF. The Defendants claim that they have not been able to find a suitable apprenticeship program. In the Joint Motion, the Defendants informed the Court that they would file a proposal as to Paragraph 79. The Court did not receive a proposal from the Defendants and is not persuaded that no program can be found. The Court will adopt the proposal filed by the Plaintiffs which reduces the requirement to one apprenticeship program.

Paragraph 96 requires the Defendants to provide recreation to women prisoners for five hours a day, seven days a

week. The Defendants claim that the physical limitations at CTF prevent compliance. The Court did not receive a proposal from the Defendants on this Paragraph as promised in the Joint Motion. The Court will adopt the Plaintiffs' compromise proposal of twenty-five hours of recreation per week. The weekly allocation of less recreation time gives the Defendants more flexibility to correct this unequal opportunity.

Paragraph 116 orders the Defendants to hire a qualified air balancing contractor to service the CTF air handling system. The Defendants claim that repairs to the system cannot be accomplished within the timeframe of the Order. Paragraph 127 requires the Defendants to install a sprinkler system in the Annex dormitories within six months of the Order. The Defendants also claim that they cannot accomplish this within that period of time. Director Moore estimates that it could take over a year due to testing the water system and the contracting process. The Court will not modify these two paragraphs. The Defendants may, however, submit a detailed report which explains the measures which have been taken to correct these serious problems, reasons for noncompliance with the Order and any reasonable alternatives to the requirements in the Order.

V. Conclusion

Since the Court finds that the Defendants have not met the standards necessary to justify a stay, the Court denies the Defendants' Motion to Stay the Judgment. The Court will, however, grant the Defendants' Motion to Modify in part. The Court modifies its Order as to Paragraphs 12, 17, 18, 20,

35, 43, 46, 47, 48, 49, 50, 55, 58, 60, 67, 70, 71, 75, 87, 102, 115, 123 and 124 and vacates Paragraphs 39, 40, 41, 42, 73 and 74.

JUNE L. GREEN
UNITED STATES DISTRICT COURT JUDGE

ORDER

Upon consideration of the Defendants' Revised Motion to Stay and/or Modify Judgment, the Plaintiffs' Opposition to Defendants' Renewed Motion to Stay and/or Modify Judgment, the Defendants' Reply, the Defendants' Supplement, the Plaintiffs' Surreply, the Joint Status Motion and Motion Proposing Modifications to the Order for Injunctive and Declaratory Relief, the Plaintiffs' Status Motion Regarding ¶¶ 79 and 96 of the Order, it is by the Court this 11th day of August, 1995

ORDERED that the portion of the Defendants' Revised Motion to Stay and/or Modify Judgment in which Defendants seek a stay is DENIED; it is further

ORDERED that ¶¶ 73 and 74 of the Court's Order of December 13, 1994 are VACATED due to the termination of the Atlantic Union College program at CTF; it is further

ORDERED that ¶¶ 39, 40, 41, 42 of the Court's Order of December 13, 1994 are VACATED; it is further

ORDERED that ¶¶ 12, 17, 18, 20, 35, 43, 46, 47, 48, 49, 50, 55, 58, 60, 67, 70, 71, 75, 87, 102, 115, 123 and 124 of the Court's Order of December 13, 1994 are amended as follows:

12. Failure of an employee to report any allegation of sexual misconduct or any facts and circumstances which would lead a reasonable employee to believe that sexual misconduct is occurring or has occurred shall subject the employee to discipline.

17. The Department shall conduct mandatory training using certified trainers on sexual misconduct for all DCDC employees. A consultant from the National Institute of Corrections (NIC), mutually agreed upon by the parties, shall develop the training plan and materials. A "certified trainer" is defined as any person who has completed the "Train-the-Trainer" course developed by the NIC consultant. The monitor(s), if they so choose may attend this training.

a. The training shall include education concerning the Defendants' policies regarding reporting, investigating, and preventing sexual harassment, and the consequences for violating any policy concerning sexual harassment; and

b. All staff who work with female prisoners shall be trained by certified trainers within six months commencing no later than August 30, 1995. After the initial training of staff, the training will be included in the pre-service training of all staff. Annual retraining shall be conducted to refresh staff on the Department Order regarding sexual misconduct.

c. Within one year, selected employees working with female prisoners shall receive a forty-hour training program on working with female offenders. A semi-annual, enhancement training on special issues related to working with female offenders will be offered to select employees.

18. Commencing no later than August 30, 1995, the Department shall conduct mandatory training on sexual harassment using certified trainers for all women prisoners currently in the DCDC. A consultant from the National Institute of Corrections (NIC), mutually agreed upon by the parties, shall develop the training plan and materials which will instruct women prisoners on the Department Order on sexual misconduct and how to recognize and report sexual harassment. Training sessions for women prisoners on sexual harassment shall be provided within a reasonable time upon a woman's entry into the D.C. Department of Corrections.

20. The Defendants shall hire within 90 days: (a) a health educator with appropriate training in obstetrics and gynecology in a half-time position who shall provide clinical and health educational services to the entire female prisoner population at CTF and (b) an additional nurse practitioner, physician's assistant with special training in obstetrics and gynecology, or nurse midwife to provide clinical services to women prisoners at CTF.

35. The Defendants shall develop and implement a protocol concerning restraints used on pregnant and postpartum women which provides that a pregnant prisoner shall be transported in the least restrictive way possible consistent with legitimate security reasons. Specifically, the protocol shall provide:

a. The Defendants shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery; and

b. During the last trimester of pregnancy up until labor, the Defendants shall use no restraints when transporting a pregnant woman prisoner unless the woman has demonstrated a history of assaultive behavior or has escaped

from a correctional facility, in which case, only handcuffs shall be used.

43. The health educator shall implement, within 60 days from the day that the health educator is hired, an obstetrical and gynecological health education program that satisfies a recognized national medical standard. Educational material should also be made available in the CTF library. The Defendants shall maintain adequate documentation on the program so that it can be evaluated by the Court within 60 days after implementation.

46. If a woman prisoner is in need of emergency obstetrical or gynecological care during evening or weekend hours, she shall be taken immediately to the emergency room at D.C. General Hospital if she is less than 20 weeks pregnant, and to the OB GYN admitting office if she is 20 or more weeks pregnant, unless employees providing obstetrical and/or gynecological care at D.C. General Hospital determine that the main emergency room at D.C. General Hospital would be more medically appropriate.

47. The Defendants shall provide each woman prisoner for whom the DCDC has advance notice of her discharge from custody with the following:

a. a supply of essential medications that will last until she may be reasonably expected to obtain necessary follow-up care in her community; and

b. referrals to services in the community to insure continuity of care.

48. If a woman is released prior to the time that abnormal results of any gynecological or obstetrical tests are received by CTF medical personnel, the Defendants shall forward the test

result to her last known mailing address. Defendants shall advise women prisoners of this policy.

49. The Defendants shall ensure that prisoners are transported to medical appointments on time.

50. The Defendants shall modify their transportation procedures so that women prisoners arrive at D.C. General Hospital no more than 2 hours before the scheduled time of their appointment.

55. For all pregnant women prisoners, the Defendants shall maintain a medical chart on an ACOG form together with a regular medical chart. All medical visits to or by the responsible physician or primary healthcare provider, orders for laboratory tests, laboratory test results and other notes and orders relating to the medical care of pregnant women prisoners shall be recorded on the ACOG form or consultation form.

58. Documentation shall be required whenever CTF medical staff elect not to follow the instructions of a consulting physician at D.C. General Hospital or elsewhere. This documentation should include the justification for not providing the therapy ordered.

60. Prisoners shall receive notice of normal results of laboratory or diagnostic tests at the discretion of the physician or upon request by the woman prisoner.

67. The Defendants shall ensure that women prisoners are escorted to and arrive at educational programs, recreation, employment, and medical care in a timely manner as scheduled in a manner that does not prevent the programming staff from performing any of their duties.

70. Women prisoners at the Annex and CTF shall be provided with the opportunity for full-time (three hours per day, five days per week at CTF and five hours per day, five days per week at the Annex) basic education to include ABE, GED, and Special Education classes.

71. Women prisoners at CTF shall have access to on-site higher education programs which shall include a four-year B.A. and/or B.S. degree program, an A.A. degree program, and a precollege program. at a minimum, bachelor programs shall be offered in one area of study, and associate programs in two different areas of study leading to a degree. Defendants shall comply with the precollege requirement of this provision within 90 days.

75. Within 90 days, the Defendants shall provide appropriate substitute teachers or instructors during absences of regular teachers or instructors of more than three working days. The provision of a substitute teacher or instructor shall not result in increasing the class size beyond acceptable community standards for a period of time exceeding 15 consecutive school days.

79. The Defendants shall provide women prisoners at CTF with at least one apprenticeship program as defined by Department order.

87. The Defendants shall revise the Department of Corrections guidelines and practices for work training placement within 30 days to take into account the different sentence structure of female offenders and to permit women's maximum participation in work training.

96. The Defendants shall immediately provide all women prisoners at CTF, including pregnant prisoners subject to medical approval, with recreation for twenty-five hours per

week. Women shall have the option of going outside or to indoor recreation facilities during the time period. This recreation schedule shall be effective at CTF within 15 days of this Order.

102. Within one year, the Defendants shall reduce the population of the Annex Dormitories 6 and 7 so that no more than 135 women are housed in the two dormitories combined.

115. Three times every year, the Defendants shall cause the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) to inspect the Annex for compliance with the requirements of environmental sanitation and maintenance and food service delivery (at the main Minimum compound). If any area is shown to be in compliance after completion of an inspection, the mid-year inspection may be an abatement inspection rather than a full inspection. At a minimum, DCRA shall conduct full compliance inspections at the Annex two times every year. Within 30 days of each inspection, the Warden of Minimum shall obtain the DCRA findings. The Warden shall repair, clean, or otherwise remedy an unsanitary, unsound, or unsafe practice or condition identified by DCRA as soon as feasible but in no event later than 30 days following the receipt of the DCRA report.

123. The Defendants shall ensure that the correctional officers inspect all plumbing fixtures daily, and shall ensure that any plumbing fixture that requires repair will be reported immediately upon discovery, and repaired in a timely manner. The Defendants shall maintain logs demonstrating compliance with this requirement.

124. Two times per year, the Defendants shall cause the District of Columbia DCRA to conduct inspections of the CTF for compliance with the requirements of environmental

sanitation, maintenance and food service delivery. Within 30 days of each inspection, the Warden of CTF shall obtain the DCRA findings. The Warden shall repair, clean, or otherwise remedy any unsanitary, unsound, or unsafe practice or condition identified by DCRA as soon as feasible but in no event later than 30 days following the receipt of the DCRA report.

it is further ORDERED that all deadlines shall run from the date of entry of this supplemental Order.

JUNE L. GREEN
UNITED STATES DISTRICT COURT JUDGE

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Appellees,

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellants.

No. 95-7041, Consolidated with No. 95-7205

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

November 14, 1996

BEFORE: Silberman and Rogers, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

Upon consideration of appellees' petition for rehearing filed September 30, 1996, and of the response thereto, it is

ORDERED that the petition be denied.

Per Curiam

Circuit Judge Rogers would grant the petition for rehearing.

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *et al.*,

Appellees,

v.

DISTRICT OF COLUMBIA, *et al.*,

Appellants.

No. 95-7041, Consolidated with No. 95-7205

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

November 14, 1996

BEFORE: Edwards, Chief Judge; Wald, Silverman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *In Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the

judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestion be denied.

Per Curiam

Statement of ROGERS, Circuit Judge, dissenting from the denial of rehearing *in banc*, joined by WALD and TATEL, Circuit Judges.

The equal protection issue in this appeal presents an important question with serious implications for prisoners as well as other persons in the government's care and custody. Given the panel majority's misconception of the point at which equal protection attaches, as described in my dissenting opinion, the case, in my view, should be heard by the *in banc* court.

PAT CANTERINO a/k/a/ PAT WILLIAMS, *et al.*,

Plaintiffs-Appellees,

and UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

GEORGE WILSON, *et al.*,

Defendants-Appellants.

No. 86-6067 NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

April 10, 1989, Filed

BEFORE: GUY and BOGGS, Circuit Judges; and SUHRHEINRICH, District Judge.[1/]

PER CURIAM. This is an appeal from the district court's ruling in this prisoners' class action suit challenging the conditions of confinement at the Kentucky Correctional Institute for Women (KCIW). This appeal focuses on only one aspect of that ruling: the requirement that KCIW hire a part-time attorney on a temporary basis in addition to upgrading the prison's library. The basis for this ruling was the trial judge's determination that the legal facilities and assistance the women had been receiving did not provide them with minimally adequate access to the courts as guaranteed by the Constitution, and that the women's facilities were not substantially equivalent to those provided to male inmates in Kentucky. *Canterino v. Wilson*, 546 F. Supp. 174, 216 (W.D. Ky. 1982).

I

In October 1980, female inmates of KCIW filed suit challenging a number of the conditions of their confinement, including the library facilities and lack of legal training and/or assistance. The district judge held a four-week trial, after which he ordered the defendants to update the prison library and provide a half-time attorney for the inmates. The court ordered the parties to brief the issue of access to an attorney and legal materials, after which the court ordered the parties to formulate a plan to provide the female inmates at KCIW meaningful access to the courts. The defendants submitted a plan proposing the hiring of an attorney for 20 hours per week. In July 1982, the district judge ordered that such an

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[1/] The Honorable Richard Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

attorney be hired.

In his opinion, the district judge found that the women lacked any history of "self-help" in the law. He further found that the library at KCIW was inadequate and that the prison had to upgrade its materials, extend its hours, and, in addition, provide the inmates with a half-time attorney to assist them. The court held that these improvements were necessary to comply with the equal protection clause, as well as to provide the inmates access to the courts. However, it should be noted that no inmate testified that they wanted any legal services that they had not been able to receive. Further, male inmates in Kentucky do not have an attorney assigned to their prisons. On the other hand, the Office of Public Advocacy (OPA) spends 96 hours per week at one male prison and 120 per week at another, while their time spent at the women's prison is limited to two to three hours every three weeks. Further, the male inmate legal aides are trained by experienced peers, whereas the women are given a two-week course, but none of their peers is experienced in handling habeas petitions or civil rights suits.

After the court issued its initial order, the defendants moved for supplemental relief regarding the order requiring that an attorney be hired, arguing that the female inmates now received the same legal services as male inmates in Kentucky. At this point, the library had been updated, and its open hours had been extended to 15 per week. In addition, the number of inmate legal assistants had been increased from one to four. The defendants stressed the fact that the Kentucky Office of Public Advocacy, a state-funded legal services agency, provides assistance with criminal matters and provides an attorney to KCIW for one half-day every three weeks to assist with civil cases. In addition, the defendants claimed that the updated library and inmate legal aides were sufficient to meet the constitutional standard.

The district judge disagreed, and again ordered the parties to provide the inmates with the equivalent of a half-time attorney, reasoning that the law library alone was not sufficient to compensate the women for the lack of a history of self-help which the male inmates had. Subsequently, in September 1986, the defendants filed a motion to amend the earlier orders of the district judge, which motion was denied. The district judge reiterated his earlier finding that the prison library alone, even after being updated, was insufficient to satisfy the right of access to the courts. The court expressly ordered the defendants to hire a half-time attorney for eighteen months to assist and train the female inmates in areas in which they needed assistance. The defendants now appeal.

II

The standard of review in this case demands that we give great deference to the factual findings of the district judge. *Kendrick v. Bland*, 740 F.2d 432, 434 (6th Cir. 1984). Although "[d]eference to prison authorities is especially appropriate when state penal facilities are involved," *Newman v. State of Alabama*, 683 F.2d 1312, 1320 (11th Cir. 1982), "district courts have broad discretion to fashion remedies once constitutional violations are found." *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). The standard, then, is one of abuse of discretion. *Id.* at 1246.

III

In *Bounds v. Smith*, 430 U.S. 817, 821 (1977), the Supreme Court affirmed the Fourth Circuit's determination that North Carolina's library plan "denied women prisoners the same access rights as men to research facilities." The Court began its analysis by stating that "prisoners have a constitutional right of access to the courts." *Ibid.* The Court

then reviewed a number of precedents in which this principle was held to require that indigent prisoners be "allowed to file appeals and habeas corpus petitions without payment of docket fees," *id.* at 822 (citing *Burns v. Ohio*, 360 U.S. 252, 257 (1959)); that trial transcripts be provided to indigent prisoners at no cost, *ibid.* (citing *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)); and that counsel be appointed when necessary to ensure "'a meaningful appeal.'" *Id.* at 823 (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). The Court explained that the guiding principle in these cases is that "States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.'" *Ibid.* (quoting *Ross v. Moffitt*, 417 U.S. 600, 616 (1974)). The Court focused on two prior cases, *Johnson v. Avery*, 393 U.S. 483 (1969), and *Wolff v. McDonnell*, 418 U.S. 539 (1974), both of which held that in the case of illiterate, indigent prisoners without the skills necessary to present their own cases, their "'constitutional right to help'" could be satisfied by securing the aid of other, more skilled inmates. *Bounds*, 430 U.S. at 823-24 (quoting *Johnson*, 393 U.S. at 502 (White, J., dissenting)). However, the Court noted that neither case had ruled out the possibility that further measures would be necessary to provide truly meaningful access to the courts to inmates. *Id.* at 824. Thus, the Court held

> that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828.

In the present case, the prison officials argue that the above holding supports their position that prisoners must be provided with either a library or legal assistance, but not both.

However, in *Bounds* itself, the Court discussed a number of alternatives to providing an adequate law library, stating that although "a legal access program need not include any particular element . . . [a]ny plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards." *Id.* at 832. In other words, the appellants are correct that it is not always necessary to provide both a library and legal assistance; however, they are incorrect in their assertion that a court may not require such a combination of elements. In fact, in *Bounds*, despite the availability of "jailhouse lawyers, the Court found that an adequate library "or other forms of legal assistance" were necessary to provide constitutionally adequate access to the courts. *Id.* at 825. Thus, the existence of a law library, however adequate, does not per se eliminate the necessity for further measures to protect the right of access to the courts.

We are aware that other courts have found that, in particular situations, both a library and legal assistance were not necessary. In *Kelsey v. State of Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980), the Eighth Circuit found that a particular prisoner's legal needs were met by existing facilities. However, that court also stated that every program "must be evaluated on its own to establish, first, what the prisoners' needs for legal assistance are and, second, whether those needs are being met." *Ibid.* (citations omitted). In *Cepulonis v. Fair*, 732 F.2d 1, 5-6 (1st Cir. 1984), the First Circuit held that it was error for the district court to have ordered both the creation of a satellite library and the creation of a law student assistance program. In *Campbell v. Miller*, 787 F.2d 217, 227-28 (7th Cir. 1986), the Seventh Circuit held that restricted access to library facilities for maximum security inmates did not deprive the inmates of meaningful access to the courts. The court relied heavily on the Ninth Circuit's opinion in *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 858 (9th Cir. 1985), in which that court stated that "[t]he fact

that an inmate must wait for a turn to use the library does not necessarily mean that he has been denied meaningful access to the courts." The Lindquist court held that a prison's adequate library plus well-trained inmate law clerks were sufficient to meet constitutional standards and, thus, appointed counsel was not necessary. *Id.* at 856. A similar result was reached in *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985), where the Eleventh Circuit held that the Constitution does not require appointment of counsel for inmates who were challenging the conditions of their confinement.

On the other hand, in *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985), the Fifth Circuit held that a bookmobile check-out system plus law student assistance did not meet constitutional standards. The court stated that, "[i]n the absence of some sort of direct legal assistance, . . ., the inmates must be given access to a library. . . ." *Ibid.* Further, in *Wade v. Kane*, 448 F. Supp. 678, 685 (E.D.Pa. 1978), *aff'd*, 591 F.2d 1338 (3d Cir. 1979)(mem.), the district court held that law student assistance did not compensate for the inadequacy of the prison's law library, and that the closing of the prison's Law Clinic coupled with the library's inadequacy amounted to a constitutional violation.

This court has held, in the past, that when a prisoner is afforded assistance of counsel, and law books were available to the inmate, no constitutional violation had occurred. *Holt v. Pitts*, 702 F.2d 639, 640-41 (6th Cir. 1983). Further, in *Glover v. Johnson*, 478 F. Supp. 1077, 1096 (E.D.Mich. 1979), *aff'd sub nom. Cornish v. Johnson*, 774 F.2d 1161 (6th Cir. 1985)(mem.), this court affirmed the district court's decision holding that the law library at the women's prison was adequate even though it was smaller than the library available to male inmates. However, the district court further stated that "the provision of a satisfactory law library does not settle this issue." *Ibid.* The court thus went on to reject the

contention, also made here by the prison officials, that either a library or legal assistance is required, but not both, stating that this was an unduly narrow reading of *Bounds*. *Ibid.* Thus, the court required that legal assistance and training was necessary to satisfy the women inmates' right of access to the courts. *Id.* at 1097.

The cases in other jurisdictions which appear to conflict with our decision here are distinguishable from this case for one important reason: none involved a finding by the district court that there was an equal protection violation in that women inmates had less satisfactory access to the courts than male inmates. *Kelsey*, 622 F.2d 956 (8th Cir. 1980); *Cepulonis*, 732 F.2d 1 (1st Cir. 1984); *Campbell*, 787 F.2d 217 (7th Cir. 1986); *Lindquist*, 776 F.2d 851 (9th Cir. 1985); *Hooks*, 775 F.2d 1433 (11th Cir. 1985). That distinction is significant. The fourteenth amendment "requires, even in the context of prison conditions, that any such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must be 'substantially related to achievement of those objectives.'" *Bukhari v. Hutto*, 487 F. Supp. 1162, 1171 (E.D.Va. 1980) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Further, "the cost of protecting a constitutional right cannot justify its total denial." *Bounds*, 430 U.S. at 825.

Here, the district judge found as fact that there was a disparity between male and female inmates' access to the courts. The judge further determined that, to cure that disparity, women inmates needed legal assistance and training on a part-time, temporary basis. The district judge ordered only that this plan be implemented on a trial basis, for only eighteen months. The prison officials do not argue that this disparity serves an "important governmental objective." They argue only that the district judge abused his discretion in basing his finding of a disparity on the women inmates' lack

of a history of self-help. However, the district court in *Glover*, as affirmed by this court, based its holding that women inmates required legal assistance on its finding that male inmates had the benefit of "experienced writ writers" among them while women inmates "have not yet developed this expertise. . . ." 478 F. Supp. at 1097. We did not find error in the use of this reasoning in *Glover*, nor do we find error here.

On the whole, then, we find no reason to afford the district judge here any less deference than was afforded the district judge in *Kendrick v. Bland*, 740 F.2d 432, 434 (6th Cir. 1984). Where, as in *Kendrick* and the instant case, the district court has had "extended involvement and intimate understanding of the facts and issues joined in this action," that judge's determinations must be given great deference. *Ibid.* Here, the district judge's extremely detailed and carefully drafted opinion, 546 F. Supp. 174 (W.D.Ky. 1982), evinces his "extended involvement and intimate understanding" of the issues, both legal and factual, involved in this case. We find no basis for disturbing his findings and conclusions. Thus, we AFFIRM.

SUHRHEINRICH, District Judge, concurring,

I am in substantial agreement with Judge Boggs' opinion but write separately to emphasize my feelings on the affirmative relief imposed by the district court. During the past four years, I have witnessed an ever-expanding volume of meritless cases generated by prisoners, many prisoners having apparently made a hobby of writ-writing. The affirmative relief ordered by the district court seems most likely to result in a further proliferation of baseless suits, rather than achieving the intended effect of providing female inmates with equal and constitutionally necessary access to the courts. However, our review here is limited to a determina-tion of whether the

district court abused its discretion in fashioning the instant remedy. Under these facts, I cannot find that the district court abused its discretion. Accordingly, I concur.

GUY, Circuit Judge, dissenting.

The district court found that the provision of attorney assistance at KWIC was essential "to establish equality of access among the female and male inmate populations." *Canterino v. Wilson*, 644 F. Supp. 738, 741 (W.D. Ky. 1986). Plaintiffs argue on appeal, and the court below agreed, that female inmates have been denied equal protection of the laws because "[h]istorically, women inmates have not gained the experience of their male counterparts in providing legal assistance to other inmates as 'writwriters' or 'jailhouse lawyers' because of the unavailability for many years of sufficient legal resources." *Canterino v. Wilson*, 562 F. Supp. 106, 112 (W.D. Ky. 1983). As additional support for its finding of an equal protection violation, the district court noted that:

> "KSP [Kentucky men's maximum security prison] has three full-time [OPA] attorneys serving around 900 inmates," or one attorney hour per about seven inmates per week. "KSR [Kentucky men's medium security prison] has two full-time attorneys and one part-time, serving 1500 inmates a total of 96 attorney hours per week," or about one attorney hour per fifteen inmates per week. There are about 150 women inmates incarcerated at KCIW. The state offered no basis for providing the women at KCIW with only one attorney hour per 150 inmates per week.

562 F. Supp. at 111 (citations omitted).

As I understand the court's rationale, it found that the

women inmates had been denied meaningful access because they had not been provided with the same access as the male inmates. This rationale does not withstand scrutiny. Initially, in order to establish an equal protection violation, plaintiffs must show that the state intentionally discriminated against women prisoners as a group for no legitimate reason. It is undisputed that, prior to the consent decree entered in the men's prison case in 1981, the law libraries at both KSR and KSP were also "woefully inadequate." Therefore, at most, the male inmates enjoyed the benefit of a constitutionally adequate library for two years longer than female inmates at KCIW. Furthermore, as the court pointed out, in 1982, the Kentucky prison system housed a minimum of 2400 male prisoners and only 150 female inmates. Undoubtedly it is an historical fact that, due to the extremely disproportionate number of male inmates, the men have, by virtue of longer and more varied experience, acquired a greater level of expertise in meeting their own legal needs. I glean from this fact no evidence of any intentional discrimination against women as a class by the state. Indeed, it appears that the OPA, which is charged by statute with providing legal assistance to inmates in criminal matters only, regulates its own hours and is not subject to the complete direction of the prison authorities in its choice of the number of hours of legal assistance to provide at any one facility.

Plaintiffs attempt to justify the court's "affirmative" sex-conscious relief under the rationale of the Supreme Court holding in *Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019 (1986), in which the Court approved the use of race-conscious affirmative relief without requiring that only identifiable victims of past discrimination be benefited. That case is inapposite for two reasons.

First, courts faced with evidence of intentional race or sex discrimination fashion relief in this area under the statutory

directive of Title VII and the longstanding and consistent federal policy to eradicate such discrimination in the employment context. Second, the Court found the race-conscious remedy appropriate in that case explicitly because the union's discriminatory practices were particularly longstanding and egregious. 478 U.S. at 476; 106 S. Ct. at 3050.

In contrast, this case presents no issue of pervasive discrimination nor any justification for imposing an "affirmative" remedy for past recalcitrance. Our sole question here is whether the state is required, under the fourteenth amendment's equal protection clause, to assist female inmates in achieving the identical level of access as is enjoyed by male inmates, even though male inmates' access may be characterized as "more meaningful" than is constitutionally required. I would answer that question in the negative and reverse.

Supreme Court, U.S.
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No. 96-1280

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA, DEPARTMENT OF CORRECTIONS, *ET AL.*,
Petitioners,

v.

DISTRICT OF COLUMBIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

For decades, the District has had large facilities for housing male prisoners on the roughly 3,000-acre reservation (including a 460 acre farm worked by inmates) it has for corrections purposes in Lorton, Virginia. In 1994, it had three medium security facilities at Lorton, each housing more than one-thousand male inmates; Occoquan (1,767 inmates), Central (1,373), and Medium (1,067). (76a) It also had a Minimum Security Facility with 963 male inmates. (118a) Most of

these facilities are old, and have dormitory-type housing, which has contributed to a history of inmate-on-inmate violence. Due to their rural setting, however they have a number of advantageous features: playing fields and athletic facilities are easy to provide. Over the years, to serve their large populations, prison training facilities have been constructed.

For more than twenty-five years, from 1966 to 1992, most women prisoners convicted of violations of District laws served their sentences in federal prisons. In 1992, when the District decided that it was too expensive to continue to maintain its women prisoners in the federal system, the District had space available for 271 inmates in a new high-rise facility it had constructed near the Robert F. Kennedy Memorial Stadium, the Correctional Treatment Facility (CTF), which it had built to treat prisoners with substance abuse histories. This 800-bed facility was readily adaptable for medium security prisoners. The District put 271 of its medium security female prisoners there. (31a) Women are housed in large units at CTF, consisting of 32 single occupancy rooms per unit. Women prisoners have free movement on their units during most of the day. They are required to be in their rooms only during count times and from 11:00 p.m. to 5:00 a.m. Each unit also has a large central gathering area and two recreation rooms that have television sets. The District converted other army barracks-type dormitory buildings at Lorton to a minimum security facility for 174 minimum security female prisoners. (76a)

When the women prisoners returned from the federal prison system, "not all programs were in place;" an internal Departmental report attributed this failure to "the Department's sudden housing of 99.5 percent of all female D.C. Code offenders without having planned, developed and implemented either programs or resources to meet the long-term treatment

needs of this unique population." (117a) Planning documents of the Department of Corrections, specifically its Work Plan Objectives for successive 1992 to 1994 fiscal years, established dual goals of the Department with regard to women inmates' programs: "to provide a level of programs and services to female inmates that is comparable to that for male inmates," and "to develop comprehensive equitable and gender specific health, mental health, education, housing and community based rehabilitation programs for females housed * * *." (Tr. IX at 99-100) The more specific goals of the programs are to "look at the educational level and try to get them to the point of high school, * * * while at the same time learning a viable, easily marketable competitive skill and addressing their substance abuse issues as well as any health issues." (*Id.* at 16) By the time of trial, in June 1994, the Department had a substantial number of programs in place to meet these goals.

At that time, the Department had education programs on three levels at CTF: an ABE program, which is adult basic education at the elementary school level; a GED program, which is high school equivalency; college, offering an A.A. degree program, from Atlantic Union College. (124a-25a; Tr. IX at 19) Women may participate in education programs either three hours or one and a half hours a day, five days a week, depending on whether they were also in a vocational program. (*Id.*) If they are in a vocational program, it is one and one half hours, with an equal period in vocational training. (*Id.*) At the Annex, women were offered ABE and GED programs up to three hours a day, five days a week. (118a; Tr. IX at 10-20) Two elective college courses and two pre-college courses were offered each semester. (119a)

CTF has several vocational education programs, which are short-term because the majority of women prisoners serve short sentences (61% serve 2 years or less; only 13% more

than 4 years). (Tr. IV at 12, 15) The vocational programs offered are computer literacy, typing, and sewing; there is also a Graphic Arts program in which 13 minimum custody female inmates participate. (127a; Tr. IX at 12-13) Women prisoners at the Annex may participate in a 15-week Graphic Arts vocational education program. (119a)

There are six apprenticeship programs at Central. (128a; Tr. IX at 31) No other facility in the Department (including CTF and the Annex) has apprenticeship programs. (*Id.* at 30, 31)

Each of the District's facilities has basic work details or programs that are necessary to maintain the facility and pay inmates between $6 and $21 a month depending on the job. (119a; 128a-29a) Women at CTF work two shifts in the culinary unit and in janitorial type cleaning jobs. (Tr. IX at 36) Women at CTF also have work details involving "clerical assignments, education aides, environmental, intake, landscape, offices, quick copy, rec clerk, religious, supply management." (128a) Women at the Annex work in culinary, sanitation, environmental, and the law library. (119a-20a; Tr.IX at 38) They also work in the "reservation squad" which does clerical work and cleaning of the Department offices at Lorton and on squads that do landscaping and cleaning of parks and other public space. (Tr.IX at 38)

Industries are businesses for profit that use prison labor and sell the output to government agencies. (120a) Industries are self-supporting and pay inmates between $80 and $300 per month. (120a) Only 604 inmates in the District's prisons work in prison industries. (120a) There are no industry programs available to men or women at CTF. (Tr.IX at 28) Sixty-five women inmates at the Annex participate in industries at the Central Facility. (120a)

At CTF, the physical plant and the fact that facilities must be shared by four groups of inmates that cannot be mixed, limit the recreational opportunities for women prisoners as well as the other groups.[1] There is an outside yard that has basketball and volleyball courts, an indoor gymnasium, and a weight room. (130a) Women have outside recreation in the yard one hour a day, five days a week; access to the gymnasium for two hours, three times a week; and low-impact aerobics two days a week for an hour each day. (*Id.*) A recreation trailer has been provided to women at the Annex, which has a ping pong table, a pool table, exercise bikes and a weight machine. Women can walk the grounds when they wish; however, the Annex has no recreational equipment other than the equipment in the trailer. Women use the recreation areas (volleyball, handball, and basketball) twice a week for three hours. Both the units at CTF and the dormitories at the Annex have rooms for television and card or board games.

The district court held that female inmates at CTF and the Annex did not receive the same access to academic, vocational, work, recreational, and religious programs as similarly situated male prisoners in other prisons in violation of the equal protection guarantee of the Fifth Amendment and of Title IX of the Education Amendments of 1972, 20 U.S.C. §

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[1] CTF houses 800, composed of: (1) the Reception and Diagnostic male inmates who cannot mingle with other inmates because they have higher security levels; (2) female offenders who must be segregated from the male population; (3) inmates in the Intensive Substance Abuse Program who are segregated from the general population for therapeutic reasons; and (4) physically impaired inmates who are vulnerable to assaults from other inmates and have specialized recreation programs to meet their needs.

1681(a). It entered broad relief requiring the District to upgrade all programs.

On appeal, the District did not challenge the provisions of the decree that related to academic and vocational education. It challenged only those portions of the decree that related to work, recreational, and religious programs. (28a) The Court of Appeals reversed with respect to them, holding that for purposes of the work, recreational, and religious programs women prisoners were not similarly situated with the comparison male prisoners. (29a-36a) The Court of Appeals followed the decisions in *Klinger v. Department of Corrections*, 31 F.3d 727, 732 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1994), and *Pargo v. Elliott*, 894 F.Supp. 1243, 1254-62, 1290-91 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995), *cert. denied*, 117 S.Ct. 98 (1996), which dealt with allegations and legal theories nearly identical to those of the inmates in this case.

REASONS FOR DENYING THE WRIT

In our view, this is solely a constitutional case. Our principal argument on the issue under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), is, as it was below, that Title IX does not reach the provision of religious programs for prisoners, or the provision of prison work details, prison industries, or recreation, because such programs are not "education programs" within the meaning of Title IX. That leaves only the Equal Protection Question in this case.

The precise constitutional question is a narrow one. It is whether, where it is perfectly lawful to segregate groups on the basis of sex, it constitutes discrimination on the basis of sex to treat the resulting groups differently for neutral (*i.e.*, non-sex-based) reasons, simply because any difference in treatment will have the effect of treating men and women

differently. We submit that under *Washington v. Davis*, 426 U.S. 229, 246-248 (1976); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977); and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979), it is not. Those decisions make clear that the equal protection guarantee of the Fifth Amendment prohibits only purposeful or intentional discrimination; it does not prohibit official action that, although facially gender neutral, results in a disproportionate impact on one sex, unless the action has a discriminatory purpose. *Feeney*, *supra*, 442 U.S. at 279-80.

In this case, it is clear that the women classified as medium security were placed in the CTF facility because that is where the District had a block of medium security spaces. There was no evidence that they were placed there *because* they were women. In accordance with its stated policy and goal, the District attempted to provide these women with access to the same sort of programs that were available to men. It had made very substantial progress toward that goal by mid-1994, when this case was tried, despite very serious fiscal problems that had required substantial reductions in city services. Women prisoners were not provided with access to as many athletic facilities because it was a good deal more difficult to provide athletic facilities in the high-rise environment to the CTF than in the extensive fields available at the 3,000 acre Lorton reservation. They were not afforded access to as many training programs for a similar reason: it was much more difficult to provide training facilities at the CTF and more expensive by far per prisoner. Indeed, as the Circuit noted, there is no claim that less money was spent affording programs to women than to men. (33a) And there is no evidence whatsoever that any training was denied to women prisoners *because* they are women.

Some different programs were provided, however, because of different characteristics of the population of women prisoners from those of the male population. In this regard it should be noted that petitioners were the first to point out these differences in the two populations. Thus their chief counsel emphasized in his opening statement that women prisoners had characteristics that differentiated them from male prisoners:

> Plaintiffs contend, and defendants do not dispute, that female inmates are more likely to be first offenders. Female inmates are more likely to have been the victims of physical and/or sexual abuse before incarceration. Female inmates suffer from lower self-esteem resulting in more dependent addictive personalities. Female inmates tend to have earned a lower rate of pay, been unemployed or on welfare prior to incarceration. Female inmates are generally less employable. Female offenders are more likely to be single parents with primary responsibilities in child rearing. Female inmates are more likely to be abandoned by their spouses, families and significant others in their lives upon incarceration, and female inmates tend to be less violent, assaultive and predatory than male inmates. (Tr. I, 4-5)

The plaintiffs' experts also noted such special characteristics. (Testimony of J. Lancaster, Tr.V at 5, 9, 10; Testimony of Dr. B. Major, Tr.IV at 43, 52-53; Testimony of Dr. S. Fiester, Tr.II at 8)

Some of the differences in the training were directly related to these differences. For example, as also emphasized in the opening statement, 82% of the women prisoners are single parents and the primary caretakers of their children. (Tr.I at 5; Tr.V at 9) A significant number are pregnant when they enter the system. The Department offers prenatal and parent-

ing classes to the women prisoners and employs a psychiatrist, a psychologist and two social workers to assist them in dealing with the many problems that arise from the separation from their children. (Tr.IX at 6-8, 10-11) Women prisoners also serve, on average, much shorter sentences than men and programs must be geared to the shorter sentences. (Tr.IX at 12, 15) It makes no sense to develop three or four-year programs for women when the vast majority serve substantially shorter sentences. (*Id.*) Finally, because the male population was so much larger than the female population, a greater variety of programs could be supported by the larger male population pool.

Thus there were reasons that were not sex-based for putting women in the facilities that DCDC did and for providing them with the different programs it did.

Petitioners' theory that any different treatment of the group of legally segregated women prisoners from that afforded men necessarily constitutes facial discrimination" is simply false analytically. It is simply not true that because a group is female that the only motive one can have for treating it differently from a group of males is because it is female. Where a sex-neutral reason is given, the burden is on one asserting discrimination to show that the real reason is discriminatory. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 514-515 (1993); *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991); *Personnel Administrator of Massachusetts v. Feeney, supra*, 442 U.S. 274, 279-81.[2] Heightened scrutiny,

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[2] The exceptions to this rule are those "rare" official actions that, although gender-neutral on their face, are "unexplainable on grounds other than" gender, or to "a classification that is ostensibly neutral but is an obvious pretext" for sex discrimination. *Shaw v.*

which forms the basis for petitioners' equal protection argument is not warranted, because there is no facial or intentional discrimination. *Wisconsin v. City of New York*, 116 S.Ct. 1091, 1100 n. 8 (1996).

Furthermore, petitioners' theory would require that *all* differences in treatment between segregated groups of male and female prisoners must be ended by an *upward adjustment* of *either* group's relative disadvantage. While the women prisoners in the CTF high-rise must be given access to additional *recreation* opportunities comparable to those available in the rural Lorton setting, the men at the old Lorton facilities must also be given housing equally *secure* to that the women have at the modern CTF. This must be done despite the fact that these differences are demonstrably not the result of any intention to disadvantage anyone because of sex, and apparently without regard to cost. Surely the Constitution does not require this.

Reno, 509 U.S. 630, 643-44 (1993); *Personnel Administrator of Massachusetts v. Feeney*, *supra*, 442 U.S. at 272. Plainly, these exceptions are not applicable here.

I. Any Circuit Conflict on the Issue in this Case Does Not Warrant Review; Prison Work Details, Prison Industries, Recreation and Religious Programs are Not Within the Scope of Title IX of the Education Amendments of 1972, because they are Not Education Programs or Activities.

Petitioners assert that the decision of the in this case directly conflicts with the decisions of other circuits. There is no conflict on the constitutional equal protection issue. The decision of the Court of Appeals in this case is in full accord with the decisions of other circuits that are closest on their facts, namely *Klinger v. Department of Corrections (Klinger I)*, 31 F.3d 727, 732 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1177 (1994); *Pargo v. Elliott*, 894 F.Supp. 1243, 1254-62, 1290-91 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1-995), *cert. denied*, 117 S.Ct. 98 (1996); and *Keevan v. Smith*, 100 F.3d 644 (8th Cir. 1996). These decisions, as petitioners concede, are directly in point. They deal with the same issues as were decided by the Court of Appeals in this case and are raised in the appellees' petition. They were decided in the same manner as the Court of Appeals decided this case.

Petitioners assert that there is a direct conflict of the decision in this case with *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994), which dealt with the applicability of Title IX of the Education Amendments of 1972, Pub. Law 92-318, 86 Stat. 373, *as amended*, 20 U.S.C. § 1681(a),[3] to prison edu-

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[3] 20 U.S.C. § 1681(a) provides, in relevant part:

No person in the United States shall on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

cation programs. After the petition was filed, the Eighth Circuit issued its decision in *Klinger v. Department of Corrections (Klinger II)*, __ F.3d __, 1997 U.S. App. LEXIS 3296, *11-*13 & N. 6 (8th Cir. Feb. 27, 1997), which rejected the similarly situated analysis of the D.C. Circuit in this case in holding that Title IX is applicable to prison education programs.

This conflict is not sufficient to warrant review, because the holdings of lower courts in this case extended the reach of Title IX to the prison education and vocational programs in the District of Columbia prison system. The only question before the Court of Appeals (and this Court) is whether Title IX is also applicable to prison work details, prison industries, recreation, and religious programs. (8a-10a, 28a) No court has extended the coverage of Title IX to these programs. *See Jeldness, supra*, 30 F.3d at 1225-26 (Leaving open the applicability of Title IX "to the farm annex, the forest work camp, or the prison industries."); *Klinger II, supra*, 1997 U.S. App. LEXIS 3296 at *15-*17 ("[T]he only logical and workable application of the definition of 'program or activity' under Title IX requires comparison of educational opportunities for female and male prisoners within the entire system or institutions operated by a state's federally funded correctional department or agency."). Moreover, the question of the applicability of Title IX is not likely to arise again in the D.C. Circuit, because the only prisons in the circuit are already under a systemwide injunction concerning education and vocational programs that is at least as broad as permitted by *Jeldness* or *Klinger II*.

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assistance * * *.

The work details, prison industries, recreation, and religious programs at issue are not education programs and, as a consequence, are not within the scope of Title IX. Respondents raised this issue of statutory construction in both courts below, and argued in the Court of Appeals that the District Court had expanded the scope of Title IX to the prison context in unprecedented and extravagant ways by including those non-education programs. The Court of Appeals found it unnecessary to reach the issue in light of its similarly situated analysis; however, it "admitt[ed] to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned." (28a, 35a-36a)[4]

Respondents' argument is based on the language of the statute. Section 1681(a) provides: "No person in the United States shall on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." The Department of Corrections receives federal funds. Title IX applies only prison "educational programs or activities." Prison industries, prison recreation facilities, and prison employment services are not "educational programs or activities" under any reasonable interpretation of those terms.

Title IX of the Education Amendments of 1972 forbids discrimination on the basis of gender in any "*education* pro-

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[4] A prevailing party may assert any ground in support of its judgment "whether or not that ground was relied upon or even considered" by the court below. *Dandridge v. Williams*, 397 U.S. 471, 475-476, and n.6 (1970); *see also, Citibank, N. A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 672-673 (1990).

gram or activity" receiving federal funds. The adjective, "education," modifies "program or activity" and limits the scope of the statute. See 34 C.F.R. § 106.1 (1993)(Title IX "is designed to eliminate * * * discrimination on the basis of sex in any *education* program or activity"; italic added). If Title IX applies to prisons at all, it does not follow that every prison function is an "*education* program or activity." Prisons are places of punishment, of isolation from society, and exist, secondarily, "for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974). Many prison programs are designed to further prisons' penal functions and institutional interests, principally security and operational efficiency. Some are intended to assist in the ultimate reintegration of prisoners into society but, even as to those, few are "educational" except in the loose sense that all experience is a learning experience.

Prison work details, industries, and work training are not primarily educational; in none is there a student-teacher relationship, the essence of an education program or activity. Work details are "support duties needed for the running of the jail." *See* D.C. Code § 24-403 (1989 repl.)(prisoners may be used for public works at workhouse at Lorton); D.C. Code § 24-412 (same, at jail). Industries are "business[es] run out of a prison where goods are produced with inmate labor and then sold * * *." *See* D.C. Code § 24-418 (prisons may sell products manufactured at Lorton). "Work training," a name for outside employment, allows inmates on the verge of release to work for regular pay in jobs outside prison.

In short, work details are designed to keep prison buildings and prison in repair; industries are designed to make money for the prisons, supply goods for the government (and, incidentally, allow prisoners to earn more than minimal spending

money); and work training is intended to reintegrate prisoners into the labor pool. None of these prison functions resembles "education program[s] and activit[ies]" to which Title IX applies under any reasonable construction of those words.

Prison recreation is also not an "educational program or activity." Recreation is intended to keep prisoners active in order to provide outlets for energy and anger; maintain health; and relieve the boredom of captivity. Unlike "extracurricular" activities at educational institutions, where recreation is part of an educational curriculum,[5] penitentiary recreation is not part of a "curriculum." See Random House College Dictionary (1967)(curriculum defined as "the aggregate of courses of study in a school, college, etc.," and as "the regular or a particular course of study in a school, college, etc.")

In sum, as the District Court's description of work details, industries, and work training reveal, and as is self-evident from any consideration of prison recreational programs, none of these activities qualifies as an "education program or activity" to which Title IX applies. It follows that the District Court's reforms of these programs are erroneous contrary to the law on which the reforms are based.

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[5]Department of Education regulations include "extracurricular" as part of "education program[s] and activit[ies]." *See* 34 C.F.R. § 106.31(a). They also prohibit discrimination against "students" in physical education courses. *See* 34 C.F.R. § 106.34.

II. Petitioners' Equal Protection Analysis is Based on the False Premise that Treating Lawfully Segregated Groups Differently for Neutral Reasons Constitutes Sex Discrimination.

The linchpin of petitioners' equal protection theory is the notion that every difference in treatment of groups that are lawfully segregated by sex constitutes "facial" sex discrimination, even when undertaken for sex-neutral reasons. We submit that this theory is inconsistent with *Washington v. Davis, supra*, and this Court's other cases requiring that there be intentional discrimination on the basis of sex to support an equal protection violation. There was no proof that any of the differences in treatment between male and female prisoners here resulted from an intent to disadvantage female inmates instead of from sex-neutral reasons.

1. For obvious security reasons, segregation on the basis of sex is the rule in our nation's state and federal prisons and is fully consistent with the equal protection guarantees of both the Fifth and Fourteenth Amendments. *Dothard v. Rawlinson*, 433 U.S. 321, 326, 336-337 (1977); *Keevan v. Smith, supra*, 100 F.3d at 646 & n.2; *Jeldness v. Pearce, supra*, 30 F.3d at 1224; *Pitts v. Thornburgh*, 275 U.S. App. D.C. 332,340, 341, 866 F.2d 1450, 1458, 1459 (1989).[6] The appellees have not contested this explicit, gender-based classification; indeed, their penological expert testified that it conforms with

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[6] This valid, gender segregation distinguishes this case from *United States v. Virginia*, 116 S.Ct. 2264 (1996) ("*VMI*"), which deals with a state institution of higher learning and the nearly uniform practice is to provide co-educational institutions.

professional, penological standards. (Testimony of Ms. Lancaster, Tr. V at 57-58)

This valid, gender-based segregation permits prison officials to treat the female (or male) inmate population as a group. Programming can be gender-specific and tailored to the special characteristics of women (or men). Prison officials need not gear programming to a non-existent, mixed population. Because gender segregation is valid, decisions relating to programming or other aspects of running a women's prison are gender neutral. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (Upholding gender neutral state law that disadvantaged women by granting public employment preference to veterans, over 98% of whom, by virtue of the policies of the armed forces were men); *Keevan v. Smith*, *supra*, 100 F.3d at 650-651; *Jackson v. Thornburgh*, 285 U.S. App. D.C. 124, 127, 907 F.2d 194, 197 (1990).

Much of petitioners' legal argument is based on the assertion that decisions of District administrators concerning programs at women's prisons reflect "facially different treatment of men and women." (Pet. at 19) Petitioners' assertions that the District's decisions relating to programs in women's prisons, when different from those in male prisons, must have persuasive justifications, be substantially related to important governmental objectives, and warrant heightened scrutiny, all flow from their assertion of facial discrimination. In light of *Personnel Administrator of Mass. v. Feeney*, *supra*, that position is not supportable. *See also*, *Keevan v. Smith*, *supra*, 100 F.3d at 650-651.

2. The District's use of the special characteristics of the male population and the female population of prisoners does not reflect gender bias. Indeed, in devising programs for these different populations, respondents would have been

irresponsible so far as a corrections matter and fiscally, not to recognize and take into account, for example, that virtually the entire female population was composed of relative "short-timers."

Petitioners use the fact that the District relies on the special characteristics of the *population* of female inmates to support their argument that the District was engaging in "generalizations about men and women as a group"--*i.e.*, sex-stereotyping. (Pet. at 20) That is simply not accurate, as petitioners' own conduct at trial shows. As quoted above, in his opening statement in the trial below, petitioners' chief counsel stressed as "undisputed" the very differences that the Court of Appellees identified as "special characteristics." Petitioners elicited testimony from three expert witnesses (a penologist, a physician, and a psychiatrist) as further support for this trial court position. Thus, in the District Court petitioners sponsored the notion that the group of women prisoners here have special characteristics.

However, in their petition in this Court, petitioners variously call these same characteristics "alleged * * * 'special characteristics'"; "generalizations about men and women as a group"; "the so-called 'special characteristics' of women"; and "sex-based stereotypes." *See* Pet. at question presented, 20, 24. Petitioners' characterizations are misstatements of the record and contrary to their previous position. The Court of Appeals did not invent these characteristics or use them in a manner different from the way the case was argued in the district court. The characteristics have firm support in the record from evidence offered by both plaintiffs and defendants.

Having sponsored the notion that the group of women prisoners here have special characteristics, petitioners cannot repudiate that position in this Court.

3. The Court of Appeals correctly held that respondents could properly rely on neutral characteristics such as the size of the populations of men and women and the physical limitations of the facilities in which they are housed (for reasons unrelated to sex).

There are huge population disparities between men and women in the District's prison system as well as most other systems, with men comprising the vast majority of the total population. As noted by the court below, prison officials cannot replicate in a comparatively small women's institution even some of the programs offered in a much larger male institution and still offer programs that address the conceded special characteristics of women prisoners. (31a)

Petitioners' position also ignores the extreme limitations a facility can impose on the provision of work details, prison industries, recreation, and religious programs to inmates and the realities of running a prison. The limitations are especially great at the Central Treatment Facility (CTF), a facility in the District which has extremely limited space when compared to the District's Lorton facilities. CTF also has four groups of inmates which can not be mixed together during educational or other programming.

The CTF houses 800 inmates, composed of: (1) the Reception and Diagnostic inmates who cannot mingle with other inmates because they have higher security levels; (2) female offenders who must be segregated from the male population; (3) inmates in the Intensive Substance Abuse Program who are segregated from the general population for therapeutic reasons; and (4) physically impaired inmates who are vulnerable

to assaults from other inmates and have specialized recreation programs to meet their needs. Thus, in addition to limitations imposed by the physical plant, there are other groups of inmates who also be given access to the limited programming space available.

By contrast, the Central, Medium, and Occoquan Facilities at Lorton, Va. do not have the physical limitations on programming that exists at the CTF. These institutions are dormitory-type facilities in a rural setting in Lorton, Va. They do not resemble the multi-story urban setting of CTF. The populations of the three institutions are sufficiently similar that facilities do not have to be shared with groups that cannot be mixed, as at CTF. The structures are very old and inmate work details are needed for maintenance. These male institutions also differ from CTF in that they have a history of extreme inmate-on-inmate violence. Programs were provided at these institutions in part to reduce idleness and violence by giving inmates something to do.

In this case, limitations on programming that relate to the facilities themselves were properly considered by the Court of Appeals.

4. Petitioners' theory that all differences in the treatment of lawfully segregated groups constitutes "facial discrimination" requires eliminating all differences in programs afforded the different groups.

The program-by-program comparison petitioners advocate would place "dozens of substantive administrative prison decisions under close judicial scrutiny and subject[] them to after-the-fact second-guessing by a federal court." *Klinger*, *supra*, 31 F.3d at 732-33. This Court has repeatedly counseled judicial restraint in cases involving the running of the nations' prisons, based on the recognition that federal courts

are ill-equipped to supervise the actions of prison administrators in making these sorts of decisions. *Rhodes v. Chapman*, 452 U.S. 337, 351 n. 16 (1981) ("[T]he problems of prisons in America are complex and intractable, and more to the point, they are not readily susceptible to resolution by decree."); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); *see also*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1976). Petitioners' legal theory is counter to this doctrine.[7]

5. Petitioners argue that the decision below will permit "a government to discriminate on the basis of sex whenever it can articulate group-based differences between the sexes." (Pet. at 24) This ignores the fact that the decision below only applies to groups that are legally segregated by sex, and, as to such groups, it only requires that plaintiffs prove that any difference in treatment results from an intent to disadvantage because of sex. The decision does not permit a plaintiff to establish facial discrimination by showing some relative disadvantage in the result.

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[7] The searching judicial examination of programming decisions could have the consequence of inducing state and local prison administrators to eliminate prison programs in the face of liability based on program by program comparison. (35a) There is no obligation under the Eighth Amendment to provide inmates with work or recreational programs. It would "wrench the Eighth Amendment from its language and history" to hold that these or the other programs involved in this case were required. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981). Moreover, prison administrators would be less willing to establish new programs or experiment with new ones, knowing that an inmate suit was a possible consequence.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WOMEN PRISONERS OF THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,

Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondents District of Columbia *et al.* in their brief in opposition do not even attempt to defend the decision below, in which the Court of Appeals for the D.C. Circuit held that it would not apply any level of scrutiny—under either the constitutional equal protection guarantee or the statutory prohibitions of Title IX—to the differential treatment of incarcerated men and women. Instead, respondents offer several "alternative" grounds for affirming the decision below, other than the one actually adopted by the D.C. Circuit. These "alternative" grounds advanced by respondents are meritless and, in any event, are irrelevant to the question presented in the petition for certiorari, which asks this Court to review what the Court of Appeals *did* do, not what it might have done differently.

A. Petitioners Challenge a Facial Classification That Disadvantages Women; Therefore The Disparate Impact Authority Relied on by Respondents is Wholly Inapposite.

The District of Columbia argues that certiorari should not be granted because this is a "disparate impact" case that does not implicate the possibility of invidious discrimination. Opp. at 6-10, 16-17. That position forms no part of the Court of Appeals' analysis and is inconsistent with decades of equal protection jurisprudence from this Court.

The District of Columbia incarcerates all minimum-security male offenders at the Lorton Minimum Security Facility, and all minimum-security female offenders at the lesser-equipped "Annex" to that facility. It incarcerates medium-security men according to their diagnostic and program needs at the Lorton Medium, Central, or Occoquan Facilities, and all medium-security female offenders,

regardless of their needs, at the Correctional Treatment Facility (CTF).

The decision to house women in certain facilities with inferior programs and services and men in different facilities with superior programs and services facially classifies on the basis of sex. *See Klinger v. Department of Corrections*, 31 F.3d 727, 734 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995); *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989). Under this Court's precedents, such sex-based facial classifications call for heightened scrutiny under the Fifth and Fourteenth Amendments. *See United States v. Virginia*, 116 S. Ct. 2264, 2274 (1996) (*VMI*); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 429 U.S. 190, 198 (1976). The Court of Appeals did not dispute that the District had engaged in facial classification on the basis of sex—nor could it consistent with its prior decision in *Pitts*, 866 F.2d at 1453—but declined to apply heightened scrutiny to differential treatment in prison programming on the ground that the two groups simply could not be compared. App. 30a-34a.

Respondents argue that the differential treatment of incarcerated men and women should not be analyzed as a facial classification warranting heightened scrutiny, but rather as an "official action that, although facially gender neutral, results in a disproportionate impact on one sex." Opp. at 7. This argument might have merit if the District's policy for making programs available to prisoners was based on length of sentence or type of offense or any other gender-neutral criteria. That is not the case, however. Gender actually determines the facility in which an offender will be incarcerated and the programs to which he or she will have

access.[1] The District's reliance on *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), and the other "disparate impact" cases it cites, Opp. at 7, is therefore misplaced.

The fact that "segregation on the basis of sex is the rule in our nation's state and federal prisons," Opp. at 16, does not change the fact that this is a facial classification. Neither do the motives underlying the District's decision to provide women prisoners with substantially different and inferior programs. As this Court explained in *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991):

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicitly facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. . . . [T]he motives underlying the employer's express exclusion of women does not alter the intentionally discriminatory character of the policy.

Id. at 199. Yet the "malevolent motive" standard is precisely that which is urged by respondents. Opp. at 7-9, 16-17.

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[1] The District's assertion that medium-security women were placed in CTF not "because they were women" but because "that is where the District had a block of medium security spaces," Opp. at 7, is incorrect. Despite the block of available spaces at CTF when it opened, general population men continued to be assigned to Medium, Central, or Occoquan, and *only* general population women (precisely because they were women) were assigned to CTF, which is not a medium-security facility but rather a controlled-movement, high-security prison.

Nor does the fact that petitioners have not challenged the sex segregation itself mean that they have forfeited the right to comparable treatment. As Judge Rogers stated in her dissent from the decision below: "Even if the District may properly segregate prisoners by sex, it does not follow that it may segregate them by sex *into unequal facilities*." App. 60a. Contrary to respondents' assertion, Opp. at 16 n.6, the decision in *VMI* does not suggest otherwise. The Court in *VMI* assumed that the education programs could remain segregated *if* they provided equal opportunity. *See* 116 S. Ct. at 2276 n.7, 2286. Similarly, the Title IX athletics regulations and cases recognize that while sex-segregation may be permissible, the segregated group of women may not be denied equal opportunity. *See* 34 C.F.R. § 106.41; *see also Jeldness v. Pearce*, 30 F.3d 1220, 1228-29 (9th Cir. 1994). Thus, the "lawful" segregation of prisoners does not eliminate the need for heightened scrutiny of the District's unequal treatment of the segregated group.

B. This Case Presents the Circuit Split Identified in the Petition.

The petition for certiorari referred the Court to a number of cases in which circuit courts have addressed the issue of whether the treatment of incarcerated men and women is comparable. Pet. at 12-18. In arguing that "any circuit conflict on the issue in this case does not warrant review," Opp. at 11, respondents have ignored many of those cases and have unsuccessfully distinguished the others.

As is apparent in the petition for certiorari, the issue of how the treatment of incarcerated men and women should be compared has arisen primarily in cases involving constitutional equal protection challenges. *See, e.g., Klinger*, 31 F.3d at 733; *Pargo v. Elliott*, 69 F.3d 280 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1994); *Keevan v. Smith*, 100 F.3d

644, 648-49 (8th Cir. 1996); *Canterino v. Wilson*, 875 F.2d 862 (6th Cir.) *cert. denied*, 493 U.S. 991 (1989); *Madyun v. Franzen*, 704 F.2d 954 (7th Cir.), *cert. denied*, 464 U.S. 996 (1983); *Smith v. Bingham*, 914 F.2d 740 (5th Cir. 1990), *cert. denied*, 499 U.S. 910 (1991).

It also has arisen in the context of Title IX. *See, e.g., Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). Since the petition was filed, another Title IX prison case has been decided. *See Klinger v. Department of Corrections*, Nos. 96-1241, 96-1243, 1997 U.S. App. LEXIS 3296 (9th Cir. Feb. 25, 1997) (*Klinger II*). That case expressly rejects the approach taken by the D.C. Circuit in the decision below, exacerbating the split in the circuits. *Id.* at *11-*13 & n.6.

In the decision under review, the D.C. Circuit held that for purposes of *both* the constitutional equal protection guarantee and Title IX, men and women prisoners were not "similarly situated" and therefore the differential treatment of the two groups could not be compared. App. 29a, 35a-36a. Thus both aspects of the circuit split are implicated in the decision below.

Respondents ignore the constitutional split and assert that the split on the application of Title IX does not warrant review because the particular programs affected by the decision of the D.C. Circuit (prison work details, prison industries, recreation, and religious programs) are different from the programs at issue in the conflicting cases, which involved more traditional educational and vocational programs. Opp. at 12. The Court of Appeals questioned whether these less traditional programs were covered by Title IX, App. 36a, but did not reach the issue because of its threshold determination that incarcerated men and women are not similarly situated. App. 30a-34a.

On the basis of the issue that the D.C. Circuit did not decide (the extent of Title IX), respondents ask this Court to disregard the split in the circuits created by what it actually *did* decide (that the programs available to men and women simply could not be compared). But the D.C. Circuit's reasoning as to why Title IX did not provide a basis for comparing the work and recreational programs for men and women prisoners would apply equally to the types of education and vocational training that respondents do not dispute would be covered by the statute. Opp. at 12-13.[2]

The split identified in the certiorari petition, which has deepened with the recent decision of the Eighth Circuit in *Klinger II*, is squarely presented and ripe for review.

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[2] Moreover, the district court's interpretation of Title IX and its implementing regulations as applicable to prison work training, industry and work details is clearly correct. *See* 34 C.F.R., Pt. 100, App. B, VII, A, B (requiring recipients to ensure nondiscrimination in "work study," "job placement programs" and "apprentice training"); 34 C.F.R. § 106.31(a) (prohibiting sex discrimination in "occupational training" offered by a recipient); 34 C.F.R. § 106.31(d) (treating "cooperative employment" as an education program or activity); 34 C.F.R. § 106.38(b) ("A recipient which employs any of its students shall not do so in a manner which violates" Title IX); *see also Canterino v. Wilson*, 546 F. Supp. 174, 191-92 (W.D. Ky. 1982) (Title IX applies to vocational training, industries, on-the-job-training), *rev'd in part on other grounds*, 869 F.2d 948 (6th Cir. 1989).

The court also correctly held that the Title IX regulations extend to recreational programs and activities. In addition to prohibiting discrimination on the basis of sex in extracurricular activities generally, *see, e.g.*, 34 C.F.R. § 106.31, the Title IX regulations also regard intramural athletics as an "education program or activity" governed by Title IX. *See* 34 C.F.R. § 106.41.

C. Respondents' Asserted "Neutral Reasons" for Treating Incarcerated Women and Men Differently Were Never Presented to the Courts Below And Are Immaterial to the D.C. Circuit's Analysis.

The District argues that the equal protection analysis which petitioners have claimed is warranted by virtue of the facial classification of male and female prisoners "is based on the false premise that treating lawfully segregated groups differently for neutral reasons constitutes sex discrimination." Opp. at 16. Respondents then suggest several reasons behind the differential treatment of men and women, including the older nature of the men's facilities and the history of violence in the Lorton facilities. Opp. at 20. As evidenced by the lack of citation, these statements are wholly unsupported by the record below and, in any event, are immaterial to the analysis of the D.C. Circuit, which determined at the threshold that men and women prisoners cannot be compared without ever asking whether the differential treatment could be justified on non-discriminatory grounds. App. 68a ("The court's failure to consider the purposes of the various prison programs at issue is perhaps understandable, inasmuch as the District has not supplied any.") (Rogers, J., dissenting).

In any event, the supposedly "neutral" reasons for differential treatment now suggested by respondents would not stand up to even minimal scrutiny, much less the heightened scrutiny demanded by this Court's precedents. *See VMI*, 116 S. Ct. at 2274; *J.E.B. v. Alabama*, 511 U.S. 127, 136-37 & n. 6 (1994); *Mississippi Univ. for Women*, 458 U.S. at 724. For example, respondents suggest that men work in skilled work details because they live in older facilities requiring more maintenance. Opp at 20. Yet the Annex buildings are equally old and in need of maintenance—and that maintenance is provided by men, even though the women inmates have

requested to work on the building themselves. App. 108a-109a.

Similarly, respondents' suggestion that men are provided with programs because they are more violent as a group than are women, Opp. at 20, does not explain how that group-based characteristic is related to providing men with superior college education, employment opportunities, and work training in the community. It is simply not the case that the more violent male inmates qualify for programming. To the contrary, an inmate can only participate in programs such as industry or community employment if he is non-violent and demonstrates good behavior.

The purpose of applying heightened scrutiny to facial classifications based on gender is to ensure that the government is not "employing gender as an inaccurate proxy for other, more germane bases of classification." *See Craig v. Boren*, 429 U.S. at 198; *Mississippi Univ. for Women*, 458 U.S. at 726; *see also J.E.B. v. Alabama*, 511 U.S. at 135 (the Court has "consistently subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender.").

Under the analysis adopted in the decision below, a court cannot determine whether the District is treating incarcerated women differently because of an exceedingly persuasive reason substantially related to the differential treatment, or because of an unlawful reason, or for no reason at all. The District in its brief in opposition makes no attempt to justify that holding but instead belatedly offers up what it asserts to be nondiscriminatory reasons supporting its differential treatment. Even a cursory analysis reveals that these "reasons" are far from "neutral." In justifying the absence of

heightened scrutiny, respondents have instead demonstrated the need for it.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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